Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID G. STAUFFACHER,

Petitioner,

v.

TELEDYNE CONTINENTAL MOTORS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 2, 1994

203 pp

QUESTIONS PRESENTED

1.) Whether an appellate and/or trial court determination of lack of proof of actual damages at trial precludes a plaintiff's claims for declaratory relief and replacement remedies in a breach of warranty claim, and also precludes plaintiff's strict liability, fraud and breach of duty of good faith claims?

2.) Whether an appellate court may affirm, notwithstanding the jury verdict in the first trial and by directed verdict in the second trial, a trial court's determination of lack of actual damages when (i) a jury has determined that actual damages exist and/or (ii) when some actual damages exist in the record (both at trial and as found by the appellate court)?

3.) Whether the "economic loss doctrine" may preclude a strict liability claim against an airplane engine manufacturer where there is no personal injury to plaintiff but where engine safety hazards and engine unreliability are present and the property (airplane with the type of engine) loses market value as a result of the engine's safety hazards and lack of reliability?

4.) Whether the invalidation of the jury verdict in favor of plaintiff in the first trial and the order of judgment as a matter of law against plaintiff in the second trial at the close of plaintiff's case-in-chief violated

plaintiff's U.S. CONST. Amend. VII right to jury trial?

5.) Whether a jury verdict of $75,000 in damages based upon three "substantial factors" also allows a strict liability claim to fail even if a breach of warranty claim may otherwise fail?

6.) Whether limitations and exclusions contained in an airplane engine manufacturer's warranty which allows the manufacturer to avoid or circumvent the cooling and durability requirements of 14 C.F.R.are unconscionable as a matter of law?

LIST OF PARTIES

The remaining parties to this proceeding are contained in the caption. Original co-defendant Piper Aircraft Corporation filed for bankruptcy and was dismissed from the action by order of the District Court on October 1, 1991.

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BRIEF OF PETITIONER

The petitioner David G. Stauffacher respectfully prays that a writ of certiorari issue to review the amended judgment and order of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 8, 1993. On December 7, 1993, Stauffacher's petition for rehearing with suggestion for rehearing en banc was denied by the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Amended Judgment and Order of the Court of Appeals for the Seventh Circuit in #92-2686 entered November 8, 1993 is unpublished and, therefore, not reported, but is reproduced in the Appendix hereto, p.1 to 48, infra. The District Court (Crabb, C.J.) dismissed Petitioner Stauffacher's strict liability claim under the "economic loss doctrine" by order dated May 2, 1991. <Order reproduced at Appendix, p. 49 to 73>. The Order of the District Court dated 2/26/92 granting defendant Teledyne a new trial notwithstanding the $75,000 jury verdict in favor of plaintiff Stauffacher in the first trial is reproduced at Appendix, p. 74 to 97. A true copy of the transcript portions from the second trial granting defendant Teledyne judgment as a matter of law in the second trial at the close of plaintiff's case-in-chief is reproduced in

the Appendix, p. 98 to 166. The Order dated December 7, 1993 of the U.S. Court of Appeals for the Seventh Circuit denying Stauffacher's Petition for Rehearing with Suggestion for Rehearing En Banc is reproduced at Appendix, page 167 to 168.

JURISDICTIONAL STATEMENT

The jurisdiction of the U.S. Supreme Court to review the judgment and order of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C.1254 (1).

The subject action was commenced November 27, 1990 in the Western District of Wisconsin.

The District Court has diversity jurisdiction under 28 U.S.C. 1332.

Plaintiff David G. Stauffacher ("Stauffacher") is a Wisconsin resident and defendant Teledyne Continental Motors ("Teledyne") is a subsidiary of Teledyne Industries, Inc. which has its corporate headquarters and principal place of business in Los Angeles, California.

On November 8, 1993, the U.S. Court of Appeals for the Seventh Circuit issued a judgment and order affirming the judgment of the District Court. <Appendix, p. 1 to 48> Stauffacher's petition for rehearing and suggestion for rehearing en banc was denied by order of the Seventh Circuit on December 7, 1993. <Appendix, p. 167-168> The jurisdiction of the U.S. Supreme Court to review the judgment and order(s) of the U.S. Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Text of statutes contained in Table of Authorities and otherwise in this Brief are set forth at length as necessary in the body of the STATEMENT OF CAS" and REASONS FOR GRANTING WRIT sections of this Brief.

STATEMENT OF THE CASE

Plaintiff David Stauffacher ("Stauffacher") commenced the subject action on November 27, 1990 in the Western District of Wisconsin against defendant Teledyne Continental Motors ("Teledyne") under theories of fraud, strict liability, breach of warranty, failure of essential purpose of the warranty and breach of duty of good faith for various problems with several Teledyne manufactured engines in Stauffachers Piper Malibu aircraft. Due to an in-flight engine failure, Stauffacher's plane almost crashed.

Stauffacher had many other engine problems. At one point Stauffacher purchased a Teledyne remanufactured replacement engine. Stauffacher contends that the entire Teledyne TS10-520BE engine line is unreliable and has incurable cylinder and lower engine overheating problems when flown at or near manufacturer Teledyne's certified altitude ceilings. Stauffacher had no personal physical injury. There is evidence in the record of a $75,000 loss of market value (of which the Teledyne engine problem was one of three contributing substantial factors) in Stauffacher's airplane, and other monetary expenditures by Stauffacher were at issue. The District Court dismissed the strict liability claim in a pre-trial motion as being barred by the "economic loss doctrine" on May 2, 1991. <Order at Appendix, page 49 to 73>. In

the first of two trials, the jury returned a verdict in favor of Stauffacher for breach of warranty and for damages in the amount of $75,000. Finding the verdict to be against the weight of the evidence, the District Court ordered a new trial, in which it subsequently granted judgment as a matter of law in favor of Teledyne. Stauffacher appealed. Upon review of the record, the Seventh Circuit appellate panel of Honorable Justices Flaum, Manion and Rovner found Stauffacher failed at either trial to prove damages with reasonable certainty. On that ground alone, the appellate panel affirmed the judgment of the District Court. <Appendix, p. 1 to 48>. Other significant details about the case are contained below.

REASONS FOR GRANTING THE WRIT

Important unsettled and/or significant questions of law are present in this case.

A.) Summary

The Panel of Seventh Circuit judges affirmed the District Court's judgment on one ground, that:

"Stauffacher failed at either trial to prove damages with reasonable certainty. On that ground, we affirm." (Appendix, at 4); and, "without a showing of damages, Stauffacher has no basis to seek reversal on either his breach of warranty claim or his claims of fraud and strict liability which did not reach the jury." (Appendix, at 13).

Stauffacher's petition for rehearing argued, and should have been granted, and Stauffacher's appeal merits U.S. Supreme Court review, reversal, remand and/or and guidance because:

1.) Stauffacher specifically and properly sought various cummulative remedies other than actual damages, and actual damages is

only one remedy for breach of warranty and failure of essential purpose of the Teledyne Gold Medallion Warranty;

2.) Even applying the Appellate Panel's findings and conclusions, Stauffacher has proven at least some actual damages justifying rehearing and/or reward for consideration of the other critical issues raised by petitioner on appeal to the Seventh Circuit.

3.) Since actual damages were proven and/or found by the jury to a constitutionally cognizable and certain level required by U.S. CONST. Amend VII and/or the alternative remedies sought by Stauffacher were also appropriate, the other significant issues raised by this case still cry out for clarification and guidance by the U.S. Supreme Court and subsequent resolution on appeal by the

Seventh Circuit and, if the Seventh Circuit deems it appropriate after remand by the Supreme Court, to require a third trial in the District Court below. Particularly, the other issues involve, inter alia, the conflicts between the Seventh Circuit's judicially created hard-line position that no tort claims or remedies are appropriate in the absence of under the "economic loss doctrine", as articulated in Miller v. U.S. Steel Corp., 902 F. 2d 573 (7th Circuit, 1990) [Petitioner's Appellate Br. at 25, 26, 29; Appellate Reply Br., at 16; and at Oral Argument], and, in direct contrast, the Wisconsin Supreme Court's position in Northridge v. W.R. Grace and Co., 162 Wis. 2d.918, 417 N.W. 2d 179 (1991) [Pet. Appellate Reply Br., at 16, 19,20, and at Oral Argument] that the "economic loss doctrine" does **not** preclude tort liability

claims when safety hazards are involved and the property loses market value as a result of the safety hazards and there is no personal injury. In its May 2, 1991 Order <Appendix, p. 49 to 73>, the District Court relied upon East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) for the proposition that the economic loss doctrine automatically barred Stauffacher's strict liability tort claim. (Appendix, p. 49 to 73; R. 20, p. 8-10; Br., Short App. 28-30; Oral Argument-Ct. of Appeals) This is inconsistant with the Wisconsin Supreme Court's position in Northridge, 162 Wis. 2d 918, holding that a safety hazard allows the court to **not** obviate strict liability or other tort claims; even though no personal injury is involved. East River, did not address or resolve what happens when a safety hazard

but no personal injury is involved. Such conflicts between the U.S., Wisconsin and Seventh Circuit Courts merit U.S. Supreme Court consideration, resolution and instruction. This is a golden opportunity to clarify the problems with the "economic loss doctrine." Stauffacher's position is that the judicially constructed economic loss doctrine and its automatic bar is an unconstitutional deprivation of property (i.e. the claim) without due process of law. U.S. CONST. Amend V. A strict liability claim is taken away by judicial fiat notwithstanding the safety hazard and real loss and damage. Also, since the record does have evidence of actual damage and liability, Stauffacher's right to have the jury decide the facts in his two trials was taken away in each, contrary to U.S. CONST. Amend. VII (Appellate Br., at 20, 38, 42, 43, 48, 51, 57 and Reply

Br., at 9, 15); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 537 (1958) (Appellate Br., at 38).

Lastly, the $75,000 damage award (based, arguably, upon the evidence in the first trial about three "substantial factors", including negative public perceptions about the Teledyne engine, causing a market value decline of the airplane of $75,000), ironically, allows the strict liability tort claim to continue even if the breach of warranty claims should fail because of the "uncertainty" reasoning of the Appellate Panel in the Order of November 8, 1993. Sumnicht v. Toyota Motor Sales, 121 Wis. 2d. 338, 360; 360 N.W. 2d. 2, 12 (1984) <Appellate Reply Br., at 23>, i.e. Wisconsin has a "substantial factor" test for causation for damages without a requirement of segregating between multiple factors.)

I. Stauffacher Appropriately Sought Remedies Alternative to Actual Damages.

Stauffacher sought:

a.) a declaration that Teledyne's "Gold Medallion Warranty" limitations and exclusions be declared unconscionable under Wis. Stat. 402.302 (Am. Comp., R. 21, at 20, para. 27; Appellate Br., at 27, 40); and,

b.) provision by defendant Teledyne of an airplane and engine which safely flies (Am. Comp., R. 21, at 20, para. 28(a)); and,

c.) the following:

> "replacement" of Stauffacher's Piper Malibu Airplane and Teledyne engine with a new Piper

Mirage Airplane and a Lycoming engine" (Am. Comp., R. 21, at 22, para. 30); and,

d.) the following:

"Alternatively, Stauffacher should be awarded a "replacement" under the contracts or (equitable remedy) of being provided, at defendants expense, with a new state-of-the-art Piper Mirage model airplane containing the new standard "Lycoming" model engine in exchange for Stauffacher's old airplane and engine." (Am. Comp., R. 21, at 22, para. 31; comparison of the two different manufacturer's engines excluded-Beaty testimony); and,

e.) the following:

"cummulative remedies are justified and permitted in this case. . . as a result of the special duty which airplane and engine manufacturers must have to the general public; and . . . by the severity of the fraud by TELEDYNE; and . . by the dangerousness of the conditions perpetuated and allowed to continue by . . . TELEDYNE." (Am. Comp., R. 21, at 22, para. 31)

On appeal and below, Stauffacher correctly argued the law of various alternative

remedies against manufacturer and merchant Teledyne from violation of defendant's various duties:

> "TELEDYNE also [i.e., in addition to good faith duties] had a statutory duty to cure the various defects in delivered engine #528357 as well as defects in remanufactured engine #273643R under Wis. Stat. 402.508." (Appellate Br., at 31) [parenthetical added]
>
> ". . ."
>
> "Clearly, Teledyne also had an obligation under the law to provide an engine and components that would last for the entire certified 2000 hour of time - between - overhaul (TBO). 14 C.F.R. 33.19 (1984) reads as follows:"
>
> > "33.19 Durability. (a) Engine design and construction must minimize the development of an unsafe condition of the engine between overhaul periods ". . ." Engine cooling. Engine design and construction must provide the necessary cooling under condition in which the engine is expected to operate. 14 C.F.R. 33.21. . ."maximum operating altitudes must be established 14 C.F.R. 25.1572 (1984). . . "Operating limitations must be established for . . . cylinder head and oil temperatures." 14

C.F.R. 25.1521(a) (July, 1990, 1964)" (Appellant's Br., at 32).

One model of Piper Malibu contains a "Lycoming" manufactured engine (as opposed to a Teledyne engine) which doesn't have the Teledyne inherent defects.

(Appellant's Br., p. 11, citing Foster testimony at 2-A-45, line 13 to 2-A-46, line 19, and excluded Pl. Ex. #24 (no difficulties in F.A.A. files for 118 Lycoming engines v. a multitude of problems with Teledyne engines (Pl. exh. 26-excluded [i.e., other Teledyne engine owners had many similiar unreliability problems]); Appellate Br., Short App., at 45-exclusions of Teledyne v. Lycoming Engines argued as reversible error at Appellate Br., at 24.)

Stauffacher demand another engine ("new" engine without inherent problems) from Teledyne. (Appellate Br., at 22, citing Tr. #2, 2-37, line 16 to 2-38, line 1)

Stauffacher argued on appeal and below:

> (a.) "Plaintiff's postion is that the whole fleet of new and remanufactured Teledyne TS10520 BE airplane engines are unreliable, period, despite design changes and "repairs" and

"replacement" efforts by Teledyne primarily under the "Gold Medallion Warranty" system. "Replacing" and authorizing "repairs" of these does no good. To make matters worse, you can't just substitute a manufacturer's engine in this particular airplane. If your engine fails in the air (like Stauffacher's engine serial #528357 did at 151 hours) the Teledyne warranty system and warranty theory do Stauffacher no good. . . . In Miller, 902 F.2d, at 525, Judge Posner talks about a possible "gap" in liability where a plaintiff might fall between tort and contract. . ."(Appellate Br., at 25)

(b.) Stauffacher's testimony showed that he complained and demanded that Teledyne make repairs or give him a "new" engine because he felt they were the manufacturers of an airplane engine and have a responsibility to not sell an unreliable, unsafe or non-durable product for its intended use. Airplanes are truly unique types of products which need high standards to protect consumers." (Appellate Br., at 28)

(c.) "Teledyne, Stauffacher contends, had a duty to not just enforce (provide) the "repair" or "replacement" options in the contracts in the face of objective knowledge that the engine was unreliable, had latent problems, and did not conform to the durability, cooling and altitude capabilites requirments of 14 CFR cited above. It seems logical that if Teledyne

provides a product which has certain and commercially reasonable (but strict) standards as by the F.A.A. and originally certified by the manufacturer, and Teledyne then become aware or should reasonably have become aware, of interviewing circumstances where enforcement of Teledyne's exclusive options to "repair" and "replace" under the contract or warranty will likely cause damages (or even commercial) loss to Stauffacher, that a duty exists to not just "repair" or "replace", but to affirmitively disclose all known defects and even to totally or completely redesign recall the product rather than "repairing" or installing an unreliable replacement engine or component." (Appellate Br., at 34-35)

(d.) "Stauffacher did make a showing that he had the right under law to demand a "new" engine several times . . " (Appellate Br. at 43)

(e.) ". . . the non-refusal by Teledyne to attempt to repair or replace does not exculpate Teledyne. Murray, 83 Wis. 2d, at 424, 265 N.W. 2d, at 524. Any delays caused by Stauffacher's efforts to cooperate and Stauffacher's interim use of the product does not eliminate the right to revoke acceptance or otherwise declare breach and seek damage. Murray, 83 Wis. 2d, at 429; 265 N.W. 2d, at 529. Teledyne should have recalled the product and made full disclosures of the risks, not just "replaced" Stauffacher's engines or

components thereof" (Appellate Br., at 46). [emphasis in original]

As to alternative remedies sought below, Stauffacher also did more than just plead them in his Amended Complaint.

In Plaintiff's Proposed Additional Questions for Voir Dire Examination, Proposed Form of Special Verdict and Proposed Additional Jury Instructions, R.44, page 2, Stauffacher contended:

> "Due to the uniqueness and complexities of the case, the proposed additional instructions and special verdict require fine tailoring to fit the circumstances and theories pursued..."
>
> ". . ."
>
> "For example, . . . the alternative "exchange "relief sought by plaintiff . . . is . .(in). .proposed Jury Instruction #4 . . ." (R. 44, at 2)

Plaintiff's Proposed Additional Jury Instruction #4 at R. 44, p. 3-4) reads,in part:

> "Upon a breach of express warranty

> (or upon a breach of implied warranty). . . a buyer may then revoke acceptance of the product, entitling him to all of his money back in exchange for the product, Wis. Stat. 402.608, or the buyer may recover his actual damages and keep the defective product. Wis. Stat. 402.714. Alternatively, buyer may. . . "get what he paid for." Wis. Stat. 402.716". "You are instructed that the plainiff, under his breach of warranty claim, is seeking either monetary damages or a new airplane and engine equivalent to the one he was suppossed to have originally purchased." (R. 44, p. 3-4)

Stauffacher was entitled to revoke acceptance and get the $463,000 from Teledyne that he paid for the airplane. This remedy was again specifically requested by counsel for Stauffacher prior to the dismissal in the second trial at Tr. 2, 2-79, line 11 ("revoking acceptance of the entire airplane").

Plaintiff didn't have to establish **any** damages to qualify to pursue the breach of warranty claims or warranty issues raised in this appeal (i.e., breach of express

warranty, implied warranty, failure of essential purpose, breach of duty of good faith, unconsionability, etc.)

II. Even Considering the Appellate Panel Findings, Stauffacher Established Some Actual Damages.

The Appellate Panel made the comment three times that the installation of the remanufactured engine improved the value of Stauffacher's airplane by $20,000 on a relative basis:

> "the plane was worth $20,000 more with the remanufactured engine" (Appendix, at 23); and,
>
> "the Malibu was worth $20,000 more with the remanufactured engine" (Appendix, at 30); and,
>
> "Indeed, it bears mentioning once again that Stauffacher's plane was worth $20,000 more with the remanufactured engine . . ". (Appendix, at 33)

In Plaintiff's Exhibit #6 (Trial #1) and Plaintiff's Ex. #60 (Trial #2, Oral Argument; Appellate Br., at 55-57), we see

the charges paid by Stauffacher of $34,711.57 for engine expenses from Stauffacher's testimony. These exhibits read, in part,

> "engine removed. . . Work Order #522, Item #. . . Engine $21,156.49. (Plaintiff's Exhibit #10, offered and admitted during witness Beaty's testimony in trial #1 contained the actual work order #522, as a source document if more back up was needed.)

Without presently debating any of the other damage findings which the Appellate Panel made in the November 8, 1993 Judgment Order, Stauffacher had, at the very least, actual damages in the appellate findings of $1,156.49 (i.e., the $21,156.49 paid for the remanufactured engine less the $20,000 value increase from the remanufactured engine.) Just because Stauffacher did a good job towards mitigating his damages by buying and paying for the remanufactured engine [because his plane was grounded due to the

#2 "spun bearing" in the engine, and Stauffacher needed to fly a scheduled demonstration for the F.A.A. (R., Tr. #2 1-167, lines 15-21; Appellate Br., at 23)] doesn't mean that Stauffacher had no actual damages proven with reasonable certainty. Further, if proven actual damages are required for this case to have gone to or stayed with the jury, or to merit further review, such actual damages are present in the facts as found by the reviewing Appellate Panel, in the amount of at least $1,156.49.

III. Other Issues in this Case Cry Out to Be Resolved.

Notwithstanding the minimum actual damages unquestionably proved and contained in the record as identified above, this case is all about a lot more than Stauffacher's exact amount of actual damages in the

breach of warranty claims. There is a pending Motion for Certification of several questions, including significant economic loss doctrine questions and, also, whether the $75,000 verdict in trial #1 must be reinstated as a matter of law since a "substantial factor" in the airplane's $75,000 loss of market value was as a direct result of the effect of Teledyne engine #2 bearing spinning problems. Sumnicht v Toyota Motor Sales, 121 Wis. 2d, 338, 360; 360 N.W. 2d. 2, 12 (1984). (Appellate Reply Br., at 5,23) Ironically, even if the breach of warranty claims should fail for the reasons in the Appellate Panel's Judgment and Order of November 8, 1993 (i.e., for "lack of reasonable certainty" <Appendix, at 4)> or the District Court's Order of 2/26/92 granting a new trial <Appendix at 74-97> (i.e., identifying one of three factors is

"pure speculation"), the jury's damage award would be definitely and unquestionably sustainable since it was also an element of Stauffacher's (previously dismissed) strict liability tort claim (i.e., the "substantial factor" test unquestionably applies to tort claims) Northridge v. W.R. Grace and Co., 162 Wis. 2d. 918; 417 N.W. 2d 179 (1991). Sumnicht, 121 Wis. 2d., at 360; 260 N.W. 2d., at 12.

Lastly, it was up to the **jury** in both trials to determine disputed factual questions such as liability for failure of essential purpose of the warranty and damages. Byrd v Blue Ridge Rural Electric Cooperative, Inc., 356 US. 525 (1958), at 537. (Appellate Br., at 38); U.S. CONST. Amend. VII; Appellate Br., at 20, 38,

42, 43, 48, 51, 57 and Appellate Reply Br., at 9, 15).

The Appellate Panel concludes:

> "Usually a plaintiff gets one bite at the apple. Stauffacher had two." Appendix, at 48.

The apple of our legal system, however, is the jury. Stauffacher got zero bites at that apple, despite jury demand in both trials.

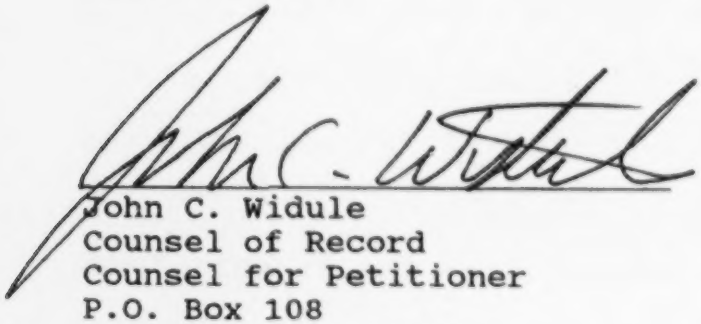
CONCLUSION

Stauffacher acknowledges the crushing work load of U.S. Supreme Court. Nonetheless, Stauffacher submits that this case merits the issuance of a writ of certiorari due to the significant economic loss doctrine and U.S. CONST. Amend. V and U.S. CONST. Amend. VII issues.

A writ of certiorari is requested in order

to clarify existing law, remand to and guide the U.S. Court of Appeals for the Seventh Circuit, and/or to reverse the decision below, reinstate the jury verdict, and/or order a new trial on the issues which never got to the jury.

Respectfully submitted this 2nd day of March, 1994.



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APPENDIX (Amended Judgment and Order of the Seventh Circuit Court of Appeals in #92-2686 <1 to 48>,; and, the Order of District Court in #90-C-903 dated May 2, 1991 dismissing the plaintiff's strict liability claim under the "economic loss doctrine" <49 to 73>; and, the Order of the District Court dated February 26, 1992, granting a new trial notwithstanding the jury verdict in favor of plaintiff <74-97>; and, the transcript containing the oral order by the District Court following the plaintiff's case-in-chief in the second trial granting judgment to defendant as a matter of law <98 to 166>; and, the Order by the U.S. Court of Appeals for the Seventh Circuit dated December 7, 1993 denying petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. <167 to 168>)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGEMENT - WITH ORAL ARGUMENT
AMENDED

Date: November 9, 1993

BEFORE: Honorable JOEL M. FLAUM,
Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Honorable ILANA D. ROVNER,
Circuit Judge

No. 92-2686

DAVID G. STAUFFACHER,
Plaintiff - Appellant

V.

TELEDYNE CONTINENTAL MOTORS,
Defendant - Appellee

Appeal from the United States District Court for the Western District of Wisconsin
No. 90 C 903, Barbara B. Crabb,
Chief Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered November 8, 1993.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued January 29, 1993

Decided November 8, 1993

BEFORE: Hon. JOEL M. FLAUM,
Circuit Judge

Hon. DANIEL A. MANION,
Circuit Judge

Hon. ILANA D. ROVNER,
Circuit Judge

Appeal from the United States
District Court for the Western
District of Wisconsin

No. 90 C 903

Barbara B. Crabb, Chief Judge.

ORDER
[Nov. 8, 1993]

No. 92-2686

DAVID G. STAUFFACHER,

Plaintiff-Appellant,

v.

TELEDYNE CONTINENTAL MOTORS,

Defendant-Appellee.

David Stauffacher sued Teledyne Continental Motors after encountering a series of mechanical problems with the Teledyne engine in his Piper Malibu aircraft.[1] In the first of two trials, the jury returned a verdict in favor of Stauffacher in the amount of

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[1] Stauffacher also sued the manufacturer of the airplane, Piper Aircraft Corporation. However, on July 19, 1991, Piper filed a Notice of Bankruptcy (R. 27), and on October 1, 1991, the district court entered an order dismissing Piper from the suit without prejudice (R. 39).

$75,000. Finding the verdict to be against the weight of the evidence, the district court ordered a new trial, in which it subsequently granted judgment as a matter of law in favor of Teledyne. Stauffacher appeals. Upon review of the record, we find that Stauffacher failed at either trial to prove damages with reasonable certainty. On that ground, we affirm the judgment of the district court.

1. BACKGROUND

Stauffacher is a Wisconsin resident who purchased a Piper Malibu in April 1987 from Mid-America Aviation, Inc. The Piper Malibu is a single engine aircraft equipped with a TSIO-520-BE engine manufactured by Teledyne Continental Motors, a division of Teledyne Industries,

Inc. At the time of purchase, Stauffacher received a limited warranty from Teledyne known as the "Gold Medallion Elite Warranty," which provided for repair or replacement of any defective part at Teledyne's cost until twelve months or 1,000 engine hours, and pro rata coverage thereafter until 2,000 hours.[2] [Note, pg. following].

Stauffacher's difficulties with the engine began in August 1987, at 151 engine hours. While en route one night from Aurora, Illinois to Madison, Wisconsin, the starter assembly shaft broke, causing the engine to lose 7.5 of its 8 quarts of oil. Stauffacher was forced to glide from an altitude of 6,500 feet to an emergency landing in Rockford, Illinois. Teledyne paid for replacement of the starter adapter gearbox assembly and

[2] The pro rata coverage required Stauffacher to pay a portion of the cost of repair or replacement equal to the total number of engine hours divided by 2,000. Thus, beginning at 1,000 hours, the warranty required Stauffacher to pay one-half of any repair or replacement costs and a progressively greater share as the number of hours on the engine approached 2,000.

provided Stauffacher with a new warranty.

Following the Rockford incident, Stauffacher encountered multiple mechanical problems that required replacement of defective engine parts on several occasions, culminating in the replacement of the entire engine in October 1990. On his mechanic's advice, Stauffacher opted to purchase a remanufactured engine rather than an entirely new engine. Because the engine being replaced had over 1,000 hours on it, Stauffacher paid a pro-rata price of $23,000 for the remanufactured engine in accordance with the warranty.[3] [Note, pg. following]. The remanufactured engine later required the replacement of a cracked starter adapter assembly main

housing, but as of the second trial in June of 1992, Stauffacher had encountered no other difficulties with the engine.

On November 27, 1990, Stauffacher commenced a diversity action against Teledyne asserting claims for breach of warranty, fraud, and strict liability. Although the court disposed of the fraud and strict liability claims,[4] [Note, pg. following]. it allowed the breach of warranty claim to reach the jury. At trial, Stauffacher attempted to show that his Piper Malibu aircraft had lost value as a result of the repeated engine problems; he also testified that

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[3] The Gold Medallion Elite Warranty provided for calculation of Stauffacher's prorata share based on engine use of 40 hours per month, unless the actual use was greater. In Stauffacher's case the actual use totalled less than 40 hours per month; nonetheless, his pro-rata share of the remanufactured engine cost was calculated in his favor using the actual time on the

engine (approximately 1100 hours). Tr. 2-A-139-40; 1-168; 2-27-28.

[4] The district court dismissed the strict liability claim in advance of trial, finding that claim barred under Wisconsin law by the economic loss doctrine. Stauffacher v. Piper Aircraft Corp., No. 90 C 903, Mem. Op. at 8-12 (W. D. Wis. May 2, 1991). The fraud claim survived until the first trial; however, at the close of plaintiffs case, the court granted judgment as a matter of law in favor of Teledyne, finding the evidence insufficient to support such a claim. Tr. 2-A- I 10- 17.

engine difficulties had forced him to make substantial expenditures. Finding that Teledyne had in fact breached an express warranty to Stauffacher (be yond the Gold Medallion Elite Warranty), the jury awarded $75,000 in compensatory damages. R. 74.

The district court granted Teledyne's motion for a new trial on the ground that the jury's verdict was against the weight of the evidence. In her opinion and order, Chief Judge Crabb found the evidence insufficient to support a claim for breach of warranty or to show any damages. In the latter regard, she found that the evidence purportedly showing that Stauffacher's plane had lost value was far too speculative and that the alleged expenditures due to engine problems were

never set forth in a clear, itemized form. Stauffacher v. Teledyne Continental Motors, No. 90 C 903, Mem. Op. at 10-12 (W.D. Wis. Feb. 26, 1992).[5] [Note, pg. following].

At the second trial, Stauffacher offered little in the way of new evidence to support an award of damages or to establish a breach of warranty. At the close of Stauffacher's case, the district court granted judgment as a matter of law in favor of Teledyne. Tr. 2-54-84. Stauffacher appeals the granting of both a new trial and judgment as a matter of law.

11. ANALYSIS

In scattershot fashion, Stauffacher seemingly challenges virtually every substantive and evidentiary decision of

the district court. Because, after a close review of the record,

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[5] Although Teledyne had also moved for judgment notwithstanding the verdict, the district court found that Teledyne's failure to seek a directed verdict on the warranty claim at the close of plaintiffs evidence barred this relief. Feb. 26, 1992 Mem. Op. at 67.

we have concluded that Stauffacher failed to establish with a reasonable degree of certainty any damages and that this failure was not due to any error of the district court, we find it unnecessary to address the issues pertaining to Teledyne's liability. Without a showing of damages, Stauffacher has no basis to seek reversal on either his breach of warranty claim or his claims of fraud and strict liability, which did not reach the jury.

With most tort claims, damages are an element of the claim itself. Eg., Warner Elektra Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1282 (7th Cir. 1993) ("as we tirelessly repeat.... without an injury there is no tort"). Of course, Stauffacher's warranty claim was

contractual in nature, and a plaintiff can recover nominal damages for breach of contract without proving any actual loss. Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1372 (7th Cir. 1990) (citing, inter alia, Vasselos v. Greek Orthodox Community of St. Spyridon, 129 N.W.2d 243 (Wis. 1964)). At the same time, we will not reverse the dismissal of such a claim merely to allow recovery of nominal damages where the appellant failed to seek nominal damages in his prayer for relief or tendered jury instructions. Dannhausen v. Business Publications Audit of Circulation, Inc., 797 F.2d 548, 552 (7th Cir. 1986). See also Sinden v. Laabs, 141 N.W.2d 865, 867 (Wis. 1966). That is so here. R. 2 at 13 para. 29; R. 21 at 22 para. 30-31; R. 44, "Plaintiffs Proposed Form of Special Verdict" at 4 Q. 11, "Plaintiffs Proposed Additional Jury

Instr. No. 4" at 4; Tr. 2-B-34-35.[6]

A failure to show any damages would therefore be dispositive in

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[6] Indeed, Stauffacher does not argue on appeal that short of adequate proof that he suffered injury as a result of Teledyne's alleged breach of warranty, he still would be entitled to nominal damages.

Teledyne's favor.[7] [Note, 2nd pg. following].

Although damages need not be shown with mathematical precision, they must be established with reasonable certainty. Ma v. Community Bank, 686 F-2d 459, 466 (7th Cir.), appeal dismissed and cert. denied, 459 U.S. 962 (1982); see also Olympia Hotels, 908 F. 2d at 1372. Granted, when the nature of the injury leaves the full extent of damages uncertain, the defendant cannot use this uncertainty to his advantage. Id. at 1373; Novo Indus. Corp. v. Nissen, 140 N.W.2d. 280, 285 (Wis. 1966). Stauffacher's case does not fall into this category, however. Whatever unique characteristics an airplane engine might possess, Stauffacher

was in no way precluded from establishing damages in a straightforward fashion. Typical measures might include the difference in value between the engine he owns and the value of an engine that complied with all warranties, the loss in the market value attributable to any defects in the engine, the repair costs borne by Stauffacher, and the costs of cover at times when the engine (and thus the plane) was not usable. See Wis. Stat. Ann. 402.714, 402.715 (West 1964 & Supp. 1992); see also Murray v. Holiday Rambler, Inc., 265 N.W.2d 513, 525-27 (Wis. 1978). Even when damages are uncertain by their very nature, the evidence should at the very least "lay a foundation which will enable the trier of fact to make a fair and reasonable estimate .... Essock v. Mawhinney, 88 N.W.2d 659, 665 (Wis. 1958) (quoting 15

Am. Jur. Damages Sec.23, at 414-15).

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[7] Insofar as Stauffacher might have been entitled to recover punitive damages on his fraud claim even if he recovered only nominal damages, cf. Robison v. Lescrenier, 721 F.2d 1101, 1113 (7th Cir. 1983), we agree with the district court that Stauffacher failed to prove any misrepresentation of fact that would support a claim of fraud. Tr. 2-A-110-17.

Our essential task is thus to determine whether the evidence "enable(d] the jury to come up with a figure that represents a reasonable estimate of the plaintiffs damages." Olympia Hotels, 908 F.2d at 1372. We will do so in the context of addressing three separate but related questions: (1) whether the district court abused its discretion in granting a new trial on the issue of damages; (2) whether the district court erred at the second trial in granting judgment as a matter of law in favor of Teledyne based in part on the lack of adequate proof of damages; and (3) whether Stauffacher was prevented from showing damages due to an error of the district court.

A. Sufficiency of Damages Evidence at

First Trial and the District Court's Decision to Grant a New Trial

We review the district court's grant of a new trial for abuse of discretion. Timmerman v. Modern Indus., Inc., 96, F.2d 692, 698 (7th Cir. 1992). A new trial is appropriate when the verdict goes against the weight of the evidence or when the award of damages is excessive. Id. Upon review of the record, we agree with the district court that the evidence presented at the first trial supplied no reasonable basis for an assessment of damages, let alone the $75,000 that the jury awarded to Stauffacher.

Stauffacher argues that the $75,000 verdict could have been based on a combination of factors. The first basis for the award, Stauffacher contends, is

the depreciation in the market value of the plane, from the $463,000 purchase price to the $245,000 that Kenneth Rittenhouse (owner of Mid-America Aviation, the Piper dealer and distributor from which Stauffacher purchased his plane) and Patrick Beatty (service manager for Clark and Mid-America Aviation) estimated it was worth at the time of trial.

See Tr. I-B-49, I-B-91-93. This contention is based on the notion that because no other engine is certified for use in the Piper Malibu and because, in Stauffacher's view, the Teledyne engine is inherently unreliable, the plane as a whole is worth much less than Stauffacher paid for it. Yet, the depreciation in the aircraft's overall value would supply a basis for damages only if the evidence also established what the depreciation of a Malibu otherwise would have been with an engine that had performed problem-free in. the more than four and one-half years Stauffacher had owned it. Without such a basis for comparison, the jury could only speculate as to what portion of the depreciation, if any, was due to the purported defects in the Teledyne engine.[8]

[Note, pg. following].

The testimony of Rittenhouse, which Stauffacher relies on as a second basis for the jury's award, suffers from a similar defect. In addition to Mid-America Aviation, Rittenhouse owns three other aviation companies. Rittenhouse testified that Stauffacher's plane had depreciated $75,000 in the prior year due to three factors: (1) a problem with the No. 2 main bearing in the engine which had resulted in an airworthiness directive requiring periodic inspections; (2) a problem with the air frame of the plane which had resulted in a separate airworthiness directive as well as the grounding of the entire Malibu fleet for a period of time; and (3) Piper's recent bankruptcy, which would cause potential buyers to wonder about such matters as warranty support on Piper planes. Tr.

I-B-93-99. When Rittenhouse was asked to

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[8] At the second trial, Stauffacher's own expert testified that the plane was worth $20,000 more with the remanufactured engine that it would have been worth had the first Teledyne engine performed flawlessly. Tr. 2-35-36; see also Tr. 2-A-34-35, 158, 163-64 (testimony of Johnny K. Foster) (first trial). Note: (con't, 6th page following)

apportion the $75,000 depreciation, however, he was unable to make any estimate as to what amount of depreciation resulted from the problem with the engine. Tr. I-B-95-96, I-B-99. As the district court aptly noted, any attempt to award damages based on this testimony would constitute "pure speculation." Stauffacher v. Teledyne Continental Motors, No. 90 C 903, Mem. Op. at 11 (W.D. Wis. Feb. 26. 1992).

As a third and final basis for the damages award, Stauffacher relies on the expenditures that he made in connection with his engine difficulties. Stauffacher did testify that he had incurred approximately $35,000 in engine-related expenses that were not covered by Teledyne (Tr. 2-A-56, 2-A-63), and he prepared an

exhibit listing individual expenditures totalling $34,711.57 (Plaintiffs Ex. No. 6). However, Stauffacher acknowledged that these charges included his pro-rated share of the cost for the remanufactured engine (Tr. 2-A-70-71), and he also seemed to admit that several charges were for work done on items that were not part of the engine (Tr. 2-A-73, 2-A-74-75). Moreover, the exhibit itself was not itemized in any fashion, instead simply listing amounts spent by date, without any explanation of the work underlying the expenses and without any attempt to show how these expenditures were the result of any defect in the Teledyne engine. Although Stauffacher did introduce into evidence the invoices reflecting the work done on his plane (Plaintiffs Ex. No. 10), he offered no analysis or explanation of those invoices that would permit a lay

jury to identify expenditures that were in some way attributable to engine problems. Thus, even if some of these expenses were due to flaws in the engine, the evidence did not enable the jury to determine which of them fell into this category. Once again, therefore, the jury was left without a basis on

which to make anything but a guess as to Stauffacher's damages. Because Stauffacher neglected at the first trial to offer any evidence that afforded a reasonable basis for the jury to ascertain damages, the district court did not abuse its discretion in ordering a new trial.

B. Sufficiency of Damages Evidence at Second Trial and the District Court's Decision to Grant Judgment as a Matter of Law in Favor of Teledyne

At the close of the plaintiffs case at the second trial, the district court granted Teledyne's motion for judgment as a matter of law. As it had in granting the new trial, the district court again concluded

that Stauffacher had failed to present evidence from which the jury could reasonably conclude either that Teledyne had breached any warranty to him (Tr. 2-57-58, 2-60-61) or that the Gold Medallion Elite Warranty had failed of its essential purpose (Tr. 2-82-84) or from which the jury could make a reasonable estimate of his damages (2-72-76). We review this decision de novo. Garrett v. Barnes, 961 F.2d 629, 632 (7th Cir. 1992); James v. Milwaukee County, 956 F.2d 696, 698 (7th Cir.), cert. denied, 113 S. Ct. 63 (1992). "A judgment n.o.v. [or directed verdict] should be denied where the evidence along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion is such that reasonable men in a fair and impartial exercise of their

judgment may reach different conclusions." Garrett, 961 F.2d, at 631 (internal quotation marks omitted).

[8 cont. from 6th pg. prec.] However, if the non-movant presents insufficient evidence upon which a reasonable person could properly base a verdict in his favor, judgment as a matter of law for the movant is appropriate. Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213 (7th Cir. 1985). Moreover, a mere scintilla of evidence will not prevent a directed verdict. Id.; see also La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

James, 956 F.2d at 698. Having reviewed the evidence presented at the second trial, we agree with the district court that the evidence was not adequate to establish Stauffacher's damages with any reasonable degree of certainly.

Although Stauffacher offered some new evidence of his damages at the second trial, the sum total of the evidence actually weighs more strongly against him in that trial than the first. The bulk of Stauffacher's evidence related to the value of his plane, yet Stauffacher's own expert, Mr. Rittenhouse, testified that the Malibu was worth $20,000 more with the remanufactured engine than it would have been had the original engine performed flawlessly and thus not required replacement. Tr. 2-35-36. Arguably, at

least, this left Stauffacher in a better position than he would have been had the original engine performed perfectly.

Stauffacher nonetheless argues that the evidence as to his damages was sufficient to reach the jury. He points first to Rittenhouse's testimony that the market value of a hypothetical warranty that the Teledyne engine would actually last as long as its certified "time before overhaul" ("TBO") of 2,000 hours would be $40,000. Stauffacher seems to be arguing that because, in his estimation, the Teledyne engine is inherently unreliable and unable to reach its TBO, and the Gold Medallion Elite Warranty is inadequate to guarantee him a reliable engine, his plane is worth $40,000 less than a plane with the hypothetical guarantee to which Rittenhouse referred.[9] Again, however, Stauffacher's

[9] The TBO represents the number of hours at which the engine must be completely overhauled or replaced, even it is performing flawlessly. At both trials, the parties disputed the significance of the TBO: Teledyne argued that the TBO simply represented the engine's maximum life; Stauffacher, on the other hand, contended that it was the (Note Con't., 2nd page following.)

theory falls for lack of a benchmark. Rittenhouse offered no estimate of the value of the Gold Medallion Elite Warranty as compared to the hypothetical 2,000-hour guarantee. The Gold Medallion Elite Warranty, after all, provided full coverage on the engine up to 1,000 hours and pro-rata coverage thereafter up to 2,000 hours. The evidence also demonstrated that Teledyne had consistently honored this warranty. Moreover, but for one problem With the starter adapter assembly main housing, the remanufactured engine had performed without incident in the two years preceding trial. Thus, despite Stauffacher's contention that the Teledyne engine was so unreliable as to render the protection afforded by the Gold

Medallion Elite Warranty illusory, the evidence did not, in fact, reasonably permit the inference that the warranty was worth nothing or that Stauffacher's plane was worth $40,000 less than a plane with the hypothetical 2,000-hour guarantee. See Tr. 2-34. Indeed, it bears mentioning once again that, according to Rittenhouse, Stauffacher's plane was worth $20,000 more with the remanufactured engine installed than it would have been had his first engine (which, by the time of trial, would have had over 1300 hours on it) performed without failure in the manner of the hypothetically "guaranteed" engine. Tr. 2-35-36. Stauffacher also relies on evidence that he spent $23,642 installing a custom

[Note: [9] cont.] equivalent of a guarantee that the engine would reach that number of hours. We point out, however, that Stauffacher testified unequivocally that he had not relied on the Malibu's 2,000-hour TBO in purchasing the plane.

Tr. 1-67. Stauffacher likewise testified that he had not relied on the terms of

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[Note: [9] cont.] Teledyne's engine warranty when he purchased the plane. Tr. 1-107. Thus, the legal basis for calculating damages based on the value of an engine that was hypothetically "guaranteed" to reach its TBO of 2,000 hours is unclear.

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collision avoidance system in his Malibu. Stauffacher had formed a partnership with a University of Wisconsin professor to develop a unique collision avoidance system, and the equipment installed in Stauffacher's plane was a prototype. The installation of the equipment thus had nothing to do with any defect in the plane's engine. Although Stauffacher did testify that this equipment could not be removed and transferred to another plane (Tr. 1-135), we do not find this to be a basis for awarding damages. Stauffacher did not testify that the equipment was inoperable in the Malibu, nor was there any testimony that in the event Stauffacher sold the plane, the equipment would not add to the plane's overall value, thus enabling Stauffacher to recoup

at least some of the money he had invested in the equipment.

Finally, Stauffacher testified once again at the second trial that he had incurred over $34,000 in engine-related expenses for which Teledyne had not reimbursed him. Tr. 1-128-29, 130-31, 179; Plaintiff's Ex. No. 60. Yet, the evidence concerning these expenditures was as minimal at the second trial as it was at the first. Stauffacher made no attempt to itemize these expenses or supply any basis for a jury to determine which of the expenses, if any, were due to defects in the engine. See Tr. 2-74.

When it granted Teledyne's motion for a new trial, the district court was quite specific in identifying the defects in the damages evidence Stauffacher had offered at the first trial. Stauffacher v.

Teledyne Continental Motors, No. 90 C 903, Mem. Op. at 10-12 (W.D. Wis. Feb. 26, 1992). Before Stauffacher rested at the second trial, the court also specifically reminded his counsel regarding Rittenhouse's inability at the first trial to identify what portion of the depreciation in Stauffacher's plane was due to defects in the

engine. Tr. 1-226, 227. Despite these warnings, the case Stauffacher made for damages at the second trial suffered from the same defects the court had identified after the first trial. On this basis, the district court was correct in granting Teledyne judgment as a matter of law.

C. Excluded Evidence of Damages

Stauffacher also argues that the district court erroneously excluded certain testimony at the second trial and thus deprived him of the opportunity to prove his damages. Of course, our review of the trial court's evidential rulings is deferential; we will find error only if such a ruling constitutes an abuse of discretion. Eg., Stutzman v. CRST, Inc.,

997 F.2d 291, 299 (7th Cir. 1993). We find no such abuse here.

Stauffacher testified that due to the history of trouble with his engines, he is reluctant to fly the Malibu aircraft above 12,000 feet. By restricting his flight to lower altitudes, however, he sacrifices speed. At the second trial, Stauffacher testified that on average his flights are seventeen percent longer than they would be if he flew the plane at higher attitudes. Tr. 1-131-32. Stauffacher then attempted to testify that the increased flight time resulted in a seventeen percent drop in the value of the plane. Tr. 1-132. The district court sustained Teledyne's objection to this testimony, noting that Stauffacher was not qualified to offer an opinion on the plane's loss in value and had not identified any rational basis for

concluding that the plane had lost seventeen percent of its original value. Tr. 132-33. We discern no abuse of discretion in this ruling. Stauffacher's formula is completely unfounded; no evidence suggests that market value of the plane

corresponds exactly to a decrease in speed.[10] [Note, pg. following].

The district court also barred Stauffacher and Rittenhouse from testifying as to the increased operating costs Stauffacher had purportedly incurred as a result of flying at lower altitudes and lower speeds. The district court appears to have barred Stauffacher's testimony on the ground that his calculation of increased operating costs rested on the same type of unfounded assumptions as his assessment that the plane had lost seventeen percent of its value due to the decrease in airspeed. Tr. 1-134-35. We find no abuse of discretion in this ruling. Rittenhouse's testimony was excluded on a different, but

related ground. Rittenhouse was asked to assume that "an airplane will be flying at 10,000 feet instead of the 25,000 foot density altitude ceiling and that it will lose 30 knots in air speed" and to offer his opinion as to what additional operating cost per hour would result. Tr. 2-13; see also Tr. 2-12. The district court sustained Teledyne's objection to this inquiry for lack of foundation. Again, we discern no error in the district judge's rationale. This inquiry assumed that Stauffacher was in fact compelled to fly at lower

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[10] We also note the lack of evidence that Stauffacher must reftain from flying above 12,000 feet. Stauffacher did testify that he was reluctant to fly at higher altitudes because the engine cylinder head temperature climbed to the top of the safe range at those altitudes, a circumstances that, in his view, would contribute to engine failure and shorten the engine's life. Tr. 1-121-22, 123-24, 187. Stauffacher also acknowledged, however, that the operator's manual for the plane indicated that the cylinder head

temperature was acceptable as long as it remained within the safe or "green" range and that the temperature had never

[Note [10] con't.] exceeded that range in his experience. Tr. 1-123-24. Indeed, at the first trial, Stauffacher indicated that since he had begun using synthetic oil in the engine, the cylinder head temperature had dropped. Tr. 2-A-52, 66; see also Tr. IB-102-03. Thus, it is far from clear on this record that Stauffacher's decision to restrict his flight to lower altitudes is in fact reasonable, such that he might be able to claim damages for any costs resulting from that decision.

altitudes (see supra n.10), that his plane would necessarily lose 30 knots in speed at those altitudes, and that the decreased speed would, in fact, result in higher operating costs. Although he was not precluded from doing so, Stauffacher failed to provide evidentiary support for these assumptions. We also note that when the inquiry was first posed, Rittenhouse indicated only that he "would have a guesstimate" of the increased operating costs. Tr. 2-13. In our view, such a "guesstimate" does not form the proper basis for an award of damages.

III. CONCLUSION

Because the record at neither trial reveals a basis for a reasonable estimate of Stauffacher's damages, Teledyne was entitled to judgment as a matter of law.

Usually a plaintiff gets one bite at the apple. Stauffacher had two. JUDGMENT AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID G. STAUFFACHER d/b/a
Excel Inn Development,

Plaintiff,

OPINION and
V. ORDER
90-C-903-C May 2, 1991

PIPER AIRCRAFT CORPORATION, and
TELEDYNE CONTINENTAL MOTORS,

Defendants.

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In this action based on the defective performance of an airplane engine, plaintiff seeks compensatory damages or replacement of the airplane and engine and punitive damages. Plaintiff claims that defendants are liable under theories of fraud, breach of contract and breach of warranty and strict liability. Jurisdiction is alleged pursuant to 28 U.S.C. 1332.

This case is before the court on defendant Teledyne's motion to dismiss plaintiff's first and third claims based on fraud and strict liability, respectively. I conclude that plaintiff has failed to state his fraud claim with sufficient particularity to satisfy Fed. R. Civ. P. 9(b). Also, I conclude that the economic loss doctrine prevents plaintiff from asserting a claim based on the tort theory of strict liability.

For the sole purpose of deciding this motion, I find that plaintiff has alleged the following material facts in his complaint.

Allegations of Fact

Plaintiff is a Wisconsin resident, who does business as a sole proprietorship known as Excel Inn Development in Madison, Wisconsin. Defendant Piper Aircraft Corporation is an airplane manufacturing corporation and seller which has its principal place of business in Vero Beach, Florida. Defendant Teledyne Continental Motors is an aircraft engine manufacturing corporation and seller which has its principal place of business in Mobile, Alabama.

On December 22, 1986, plaintiff agreed to purchase a new 1987 Piper Malibu airplane,

serial 14608062, from Mid-America Aviation, Inc, an agent authorized to sell and service airplanes manufactured by Piper. Piper manufactured the Malibu airplane, which contained an engine manufactured by Teledyne.

At the closing of the sale in April 1987, plaintiff accepted the Piper Aircraft Limited Warranty, which excluded coverage of the plane engine. Also as part of the sale, Teledyne provided a "Gold Medal Warranty" for its engine. These warranties attempt to limit defendants' obligations to repairing or replacing any defects and limit the remedies and damages available to plaintiff.

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Since plaintiff's purchase of the Malibu airplane, he has experienced numerous problems with the engine and airplane. On August 29, 1987, the engine and airplane lost 7 quarts of oil as a result of a starter assembly breakage and plaintiff was forced to land in Rockford, Illinois. On the advice of agents of MidAmerica, Teledyne and Piper, plaintiff had a new starter adapter gearbox assembly installed, but the engine was not replaced or effectively repaired. Defendants, or their authorized agents, assured plaintiff that the "repairs" as made "would give him an engine as good as a new replacement."

At 409 engine hours, plaintiff lost the use of the compressor drive belt for the air conditioner and the airplane was grounded for a month. Plaintiff had the airplane and engine repaired according to advice given by defendants.

At 872 engine hours, the airplane and engine needed new cylinder heads and turbochargers. The engine cylinders were damaged because of wear or excessive "heat problems. Teledyne attempted to make repairs.

At 874 engine hours, the airplane and engine needed a new alternator. Mid-America attempted repairs on behalf of defendants.

On April 11, 1990, defendants issued a bulletin that warned of oil leaks and advised substantial owner maintenance for every ten operating hours.

In October 1990, Piper announced the problem of "smoking rivets" in the tail area for its line of Malibu airplanes.(1)* In a letter dated October 26, 1990, plaintiff wrote Piper listing the defects he had experienced with the Malibu airplane and demanding an exchange of the airplane for one of Piper's state-of-the-art Mirage airplanes with a Lycoming model engine.

On October 30, 1990, an agent of defendants informed plaintiff that the lower main bearing in engine cylinder #2 of the Malibu airplane was broken in three places. on the same date, an authorized agent of defendants told plaintiff that a "replacement" engine would be "sufficient and safe." In a letter dated October 30, 1990, plaintiff demanded that Teledyne provide a "replacement" engine by November 16, 1990, because of plaintiff's business

obligations. Defendants installed the "replacement" engine through its authorized agents.

On November 18, 1990, plaintiff read an article in Aviation International News, dated November 1, 1990, and became aware of a public settlement agreement in a California case in which Teledyne was alleged to have been responsible for distributing a product line of seriously defective, dangerous and hazardous engines with

*(1) Plaintiff alleges that "upon information and belief," this "dangerous structural and/or design inadequacy" has led to mid-air breakups resulting in death involving at least four Malibu airplanes.

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inadequate stress engineering. The product line is commonly known as the Teledyne Continental TSIO-52BE engine line, and includes plaintiff's original engine in the Malibu airplane and the replacement engine.

Through their agents, defendants intended to and did deceive plaintiff by representing to him and assuring him that a "replacement" engine would be safe and reliable and that plaintiff could still rely upon Teledyne's Gold Medal Warranty to provide a safe and reliable engine for the Malibu airplane. These representations were false when made and induced plaintiff's justifiable reliance by causing him to demand and accept a "replacement" engine manufactured by Teledyne to be installed in the Malibu airplane. The "replacement" engine is still equivalent to a Teledyne Continental

TS10-52BE engine and contains the same or substantially similar defects, including inadequate stress engineering. Defendants were aware of these defects when the representations and assurances were made to plaintiff in October 1990 and when the "replacement" engine was installed in November 1990. Defendants' recommendation and allowance of the installation of the "replacement" engine was a fraudulent concealment of an unreasonably dangerous condition.

Opinion

Defendants contend that plaintiff's complaint fails to allege fraud with the particularity required by Fed. R. Civ. P. 9(b) and that the doctrine of "economic loss", as applied in Wisconsin, precludes plaintiff from asserting a claim based on the tort theory of strict liability.

1. Alleging Fraud with Particularity Rule 9 (b) of the Federal Rules of Civil Procedure requires that "(i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Conclusory allegations of fraud, corruption or conspiracy or general references to plans or schemes do not satisfy the particularity requirement, no

matter how often such accusations are repeated. Flynn v. Merrick, 881 F.2d 446, 449 (7th Cir. 1989). To meet the particularity requirement, "'a complaint must specify the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.'" Sears v. Likens, 912 F.2d 889, 893 (7th Cir. 1990) (quoting Design Inc. v. Synthetic Diamond Technology, Inc., 674 F. Supp. 1564, 1569 (N.D. Ill. 1987)).

Plaintiff's allegations of fraud fail to meet this standard.

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Although plaintiff specifies that a statement made on October 30, 1990, and other assurances made around the same time were false and intended to deceive, he identifies the person or persons making the statements only as defendants' "authorized agents." This is not sufficient. See Sweeney Co. of Maryland v. Engineers-Constructors, Inc., 109 F.R.D. 358 (E.D. Va. 1986) (allegations of statements made by defendants' "agents and employees" do not satisfy Rule 9(b)); see also Chicago Heights Venture v. Dynamit Nobel of America, Inc., 575 F.Supp. 214, 220 (N.D. Ill. 1983), aff'd, 782 F.2d 723 (7th Cir. 1986) (although plaintiffs sufficiently alleged content and time frame of misrepresentations, failure to identify particular individuals involved, location of misrepresentations or advertising medium through which

misrepresentations reached them fell below standards of Rule 9(b)).

Plaintiff argues that by incorporating the November 1, 1990 article from Aviation International News, he has alleged sufficiently that defendants fraudulently concealed unreasonably dangerous defects in the engine and replacement engine of the Malibu airplane. However, plaintiff again fails to identify any individual agents involved in acts of fraudulent concealment. See Sweeney, 109 F.R.D. at 360. mMreover, plaintiff cannot rely on allegations made in other lawsuits or in press reports to support conclusory suspicions of defendants' motives. Stern v. Leucadia

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Nat'l Corp., 844 F.2d 997, 1004 (2d Cir.), cert. denied, 488 U.S. 852 (1988) (not enough to quote press speculation about defendants' motives and press reports of other occasions on which defendants engaged in similar fraudulent behavior with other companies.). Accordingly, I will grant Teledyne's motion to dismiss plaintiff's claim based on misrepresentations and fraudulent concealment, but will allow plaintiff an opportunity to amend his complaint to allege fraud as required by Rule 9 (b).

2. Doctrine of Economic Loss

The parties agree that Wisconsin law governs the question whether the economic loss doctrine bars plaintiff's claim based on strict liability. The Wisconsin supreme court adopted the economic loss doctrine in Sunnyslone Grading, Inc. v. Miller, Bradford and Risberg, Inc., 148

Wis. 2d 910, 437 N.W. 2d 213 (1989) . It held that "a commercial purchaser of a product cannot recover solely economic losses from the manufacturer under negligence or strict liability theories, particularly . . . where the warranty given by the manufacturer specifically precludes the recovery of such damages." Id. at 921, 437 N.W.2d at 217-18.

In Miller v. U.S. Steel Corp., 902 F. 2d 573 (7th Cir. 1990) , the court of appeals applied Wisconsin law and held that the economic loss doctrine prevented the plaintiffs from bypassing

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contract law and filing a products liability tort claim against the defendants. The court explained that "[t]he insight behind the doctrine is that commercial disputes ought to be resolved according to the principles of commercial law rather than according to tort principles designed for accidents that cause personal injury or property damage. A disputant should not be permitted to opt out of commercial law by refusing to avail himself of the opportunities which that law gives him." Id. at 575. See also East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986)(adopting economic loss doctrine in admiralty case).

Plaintiff contends that the economic loss doctrine should not bar him from pursuing tort claims in this case because it involves a defective product which creates

a dangerous risk of personal injury and possibly, death. Plaintiff cites no authority for his position. However, in East River, the Supreme Court rejected a similar approach that would allow products liability tort claims in cases in which a defective product creates a situation potentially dangerous to persons or other property and economic loss occurs as a proximate result of that danger. The Court stated that:

> We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. or it may be calamitous. . . . But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accidentlike event, the resulting loss due to repair costs, decreased value and lost profits is essentially the

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failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law.

East River, 476 U.S. at 870.

In addition, plaintiff argues that the economic loss doctrine should not apply in this case because the defective engine caused damage to property other than the engine itself by diminishing the value of the Malibu airplane. In Tony Spychalla Farms, Inc. v. Hopkins Agricultural Chemical Co., 151 Wis.2d 431, 444 N.W.2d 743 (Ct. App. 1989), the court of appeals refused to extend the holding in Sunnyslope to a case in which a defective product damaged property other than itself. However, in Midwhey Powder Co. v. Clayton Industries, 157 Wis.2d 585, 460 N.W.2d 426 (Ct. App. 1990), the same panel of judges clarified its exception to Sunnyslope. In Midwhey, the plaintiff purchased an energy production system

designed to reduce the substantial cost of energy used in its manufacturing process. One of the energy production system's components was a steam generator which did not operate properly. The plaintiff alleged that excessive moisture in the generator damaged the generators themselves and the turbines to which they were attached. The court rejected the argument that damage to the turbines was damage to "other property," as stated in Tony Spychalla Farms. "The turbines were connected to the steam generators as an integral part of a total energy saving system. and, therefore, damage to the turbine does not permit a tort

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claim against the manufacturer of the generator. 157 Wis. 2d at 590-91, 460 N.W.2d at 429.

The holding in Midwhey is consistent with the opinions of other courts that do not allow an exception to the economic loss doctrine where a defectively designed component causes damage to the machine or product with which it was sold as an integrated package. See East River, 476 U.S. at 867 ("Since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in virtually every case where a product damages itself."); Petroleum Helicopters, Inc. v. Avco Corp., 1991 U.S. App. LEXIS 6677 (5th Cir. April 17, 1991) (holding that damage to helicopter caused by defect in floatation device is not damage to

"other property" where plaintiff bargained for an integrated helicopter and flotation device); cf. Lease Navaio, Inc. v. Cap Aviation, Inc., 1991 U.S. Dist. LEXIS 4208 (E. D. Pa. April 3, 1991) (negligence claim against component manufacturer allowed where third-party plaintiff purchased defective component separately from airplane engine which exploded).

In this case, plaintiff bought the Malibu airplane and the Teledyne engine as an integrated whole and accepted warranty coverage for both the airplane and the engine at the time of sale. Any diminution in the value of the Malibu airplane caused by

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defects in the engine does not constitute damage to "other property" or an exception to the economic loss doctrine.

Finally, plaintiff contends that tort remedies should be available to him because the limited remedy of repair or replacement in defendants' warranties failed of its essential purpose. Pursuant to Wis. Stat. Sec. 402.719 (2) , if a limited warranty "fails of its essential purpose," a buyer is entitled to invoke any of the remedies provided by the Uniform Commercial Code, including consequential damages. Fidelity & Deposit Co. of Maryland v. Krebs Engineers, 859 F.2d 501, 504 (7th Cir. 1988)(quoting Murray v. Holiday Rambler Corp., 83 Wis.2d 406, 430, 432, 265 N.W.2d 513, 525, 526 (1978)) ; Midwhey, 157 Wis. 2d at 593-94, 460 N.W. 2d at 430. However, a

determination that a warranty fails of its essential purpose does not authorize tort causes of action against the manufacturer of the product. Id. Accordingly, I will grant Teledyne's motion to dismiss plaintiff's claim based on the tort theory of strict liability.

ORDER

IT IS ORDERED that defendant Teledyne's motion to dismiss the first claim in plaintiff's complaint for failure to allege fraud with particularity is GRANTED. Plaintiff shall have until June 3, 1991, in which to file an amended complaint in compliance with Fed.

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R. Civ. P. 9(b).

IT IS FURTHER ORDERED that defendant Teledyne's motion to dismiss the strict liability claim set forth in the third claim of plaintiff's complaint is GRANTED.

Entered this day of May, 1991.

BY THE COURT:

BARBARA B. CRABB District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DAVID G. STAUFFACHER.d/b/a
Excel Inn Development,

Plaintiff,

OPINION AND ORDER

V.

90-C-903-C

TELEDYNE CONTINENTAL MOTORS,

Defendant.

- -

This civil action for breach of warranties is before the court following a jury trial in which the jury found that defendant breached express warranties made to plaintiff, and awarded plaintiff $75,000 to compensate him for the damages

resulting from the breach. (Plaintiff sued Piper Aircraft Corporation as well as Teledyne; Piper's bankruptcy proceedings stayed the action as to it.) Defendant has moved for judgment notwithstanding the verdict or in the alternative for either an amendment of the judgment to reduce the jury award to $10,000 or a now trial. I conclude that defendant' s failure to move for a directed verdict on the breach of warranty claim bars it from obtaining judgment notwithstanding the verdict, but that the jury's verdict is not supported by the evidence and that a new trial must be held.

From the evidence adduced at trial, the jury could have found

the following facts.

FACTS

Plaintiff is a Wisconsin resident who purchased a now 1987 Piper Malibu airplane from Mid-Araerica Aviation, Inc., an authorized sales and service agent of Piper. The agreement to purchase was reached in December 1986; the closing took place in April 1987. The plane was the second Malibu that plaintiff had purchased. Included in the now plane, as in plaintiff's old plane, was an engine manufactured by defendant Teledyne, which is an aircraft engine manufacturing corporation with its principal place of business in Alabama.

At the April closing, plaintiff accepted the Piper limited warranty, which excluded

coverage of the engine, and defendants "Gold Medallion Elite Warranty,," which covered the engine and purported to limit defendant's obligations to repairing or replacing any defective engine or part. Other than the Gold Medallion Elite Warranty, plaintiff received no written or oral warranties from defendant. Plaintiff did not receive any advertising brochures or other written materials from defendant that induced him to purchase the plane. Plaintiff did not have any direct dealings with defendant at the time of the purchase of the plane.

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Sometime in 1988, defendant published a specifications sheet that stated, among other things, that the engine in the Malibu "is a six cylinder horizontally opposed air-cooled engine. The 2000 hour TBO [time before overhaul] was attained by utilizing proven hardware and advanced technology."

In August 1987, plaintiff was forced to land his plans in Rockford, Illinois, after his engine lost 7 quarts of oil as a result of a starter assembly breakage. Defendant sent a representative to Rockford to evaluate the engine and advised plaintiff it would replace the starter adapter gearbox assembly. Defendant assured plaintiff that the repairs would solve his problems. Defendant paid for the repairs and gave plaintiff a new warranty.

At 409 hours of flight timey the engine lost its compressor drive belt. Defendant replaced it.

In December 1989, at 872 hours flight time, plaintiff had to have the turbocharger replaced. He then took the plane to Clark Aviation in Blooraington, Illinois for routine maintenance and discovered that the cylinder heads were out of round. He was advised to replace them. Defendant assured plaintiff that the work would give him "basically a new top part of the engine." Trans. I-A-39. Defendant paid for the'repairs.

At 874 hours, the geared driven alternator had to be replaced.

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Defendant paid for the replacement. on April 11, 1990, defendant issued a bulletin warning of oil leaks and advising substantial owner maintenance for every ten operating hours.

At 1080 hours, a routine inspection of the engine found the #2 main bearing split in several-pieces. At first plaintiff demanded that defendant provide him a new engine, but at the suggestion of his own mechanic, he changed his demand to a remanufactured engine, which defendant provided and plaintiff's mechanic installed. Defendant assured him it would be sufficient and safe. Plaintiff was provided a Gold Medallion Warranty for the remanufactured engine (not the Elite warranty, but a shorter one-year or 1000 flight hour warranty). The cost of the engine was pro rated, as provided in the

Gold Medallion Elite Warranty. (Under the Gold Medallion Elite Warranty, defendant agrees to replace at its own expense an engine that is found to be defective in materials or workmanship within the first 1000 hours of flight or within 12 months, whichever comes first.) Plaintiff paid about $22,000 as the portion of the cost equal to that portion of 2,000 flight hours he had flown.

At 1100 hours, the engine was inspected to ensure that the main starter adaptor shaft was centered in the housing. At 1130 hours, the starter adaptor assembly main housing was found to be cracked and had to be replaced.

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When plaintiff tries to fly the Malibu at 25,000 feet, the cylinder head temperatures rise to the top of the area of the temperature gauge described as safe by the plane's manual. At 12,000 feet or lower the gauge remains in the middle of the safe area.

Plaintiff had difficulties with the first Malibu he owned; after 300 hours of flight time, he was getting very low compression in the engine cylinders and was advised to put in a new engine, which he did, and for which he paid the pro rated cost available under defendant's warranty.

Defandant's a engine is the only engine that is certified by the FAA for use in the Malibu plane.

Plaintiff paid $463,852 for the Malibu he bought in 1986. Its value at time of trial was $200,000, or if used for

trade-in, $245,000. The plane's value had decreased $75,000 over the preceding year, because of Piper's bankruptcy, an air frame related problem that limits use of the plane under instrument flight rule conditions and a main bearing spinning problem in the engine. It is not possible to determine what portion of the decrease is attributable to which cause.

A plane that has an engine that has been flown for 1200 hours becomes more valuable when the engine has been replaced with a new or remanufactured engine.

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OPINION

In his complaint, plaintiff made claims of fraudulent representation and breach of express and implied warranties. The fraudulent representation claim was dismissed during trial on defendant's motion for a directed verdict. Defendant did not move for a directed verdict on the breach of warranty claims. It contends now that such a motion can be inferred from the one it did make. Although the issues overlap in some respects, the claims are distinct, and discussion of the motion for directed verdict was focused solely on the misrepresentation claim. I an not persuaded that it would be fair to Plaintiff to treat the motion as encompassing all of plaintiff's claims, since plaintiff was not put on notice that he should respond in that manner. Avoiding undue prejudice to the plaintiff

is the purpose of Fed. R. Civ. P. 50(b)'s requirement that a motion for directed verdict at the end of plaintiff's case must precede a motion for judgment notwithstanding the verdict.

[T]here was a reason why at common law you could not just spring a motion for judgment notwithstanding the verdict, rather than having to move for a directed verdict before the jury retired to consider its verdict; and whether or not there was a reason then, there is a pretty good reason today. it given the opposing party a chance to repair--more. prooir-ely, to ask the judge for leave to repair--the deficiencies in his, proof before it is too

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late.

McKinnon v. City of Berynn, 750 F.2d 1383, 1380 (7th Cir. 1984).

There is no such prerequisite to a motion for new trial. A court is free to order a new trial, even on its own motion, Fed. R. Civ. P. 59(d), in the interests of justice. Among the grounds for doing so are an excessive verdict and a verdict that is against the weight of the evidence. See 11 Charles A. Wright and Arthur Miller, Federal Practice and Procedure, Sec. 2805 (1973).

Both grounds are present here. Although the Jury found that defendant had made plaintiff express representations, beyond the terms of the Gold Medallion warranty, to induce him to buy either the original Piper package that included defendant's engine or to buy the remanufactured

replacement engine he bought in 1990, or both, there is no evidence to support this finding. Plaintiff had no dealings with defendant when he bought his second Malibu in 1986. He adduced no evidence that he had seen any written materials from defendant before he decided to buy the plane. When he bought the remanufactured engine, it was on his own machanic's recommendation.

The jury was instructed that in order to find that defendant had made an express warranty beyond the terms of the Gold Medallion Warranty, it had to find 1) a direct and positive representation of a fact; 2) inducement to the buyer; and 3) reliance thereon by the

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buyer.

Express warranties. are governed by U. C. C. Sec. 313, incorporated into Wisconsin law at Wis. Stat. Sec. 402.313. This section provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the good shall conform to the description.

. . . . The Wisconsin Jury Instructions on express

warranties provides:

An "express warranty" is an express statement of fact material to the transaction which is a part of the contract between the parties (and collateral to the express object of such contract). Any direct and positive

representation of a fact (affirmation of a fact) (or acts equivalent to such affirmation) made by the seller to the purchaser during the negotiations to effect a sale respecting the quality of the article or the efficiency of the property sold, constitutes a warranty if relied upon by the purchaser in making the purchase.

The principal elements of an "express warranty" are: (1) (affirmation of a material fact) (a direct and positive representation of a fact) (a promise material to the transaction by the seller); (2) inducement to the buyer; (3) reliance thereon by the buyer.[1]

[1] Barkley Clark and Christopher Smith make a good argument for reading U.C.C. 2-313 as not requiring reliance, since the drafters of this section "consciously chose another phrase," that Is, "basis of the bargain." Barkley Clark & Christopher Smith, The Law of Product Warranties, 4-32 (1084). Clark and Smith suggest that [Note [1] con't. 2nd pg. following].

Even if the jury had found that the specifications sheet published by defendant constituted a direct and positive representation of fact, that is, that its engines could be expected to operate for 2000 flight hours without a need for major repairs, because they were made from "proven hardware," the jury could not have made the next finding, that those representations were an inducement to plaintiff to buy the engine. Plaintiff never testified that he had known of those specifications before he bought the Malibu in 1986, or that he relied on them in deciding to make the purchase. Given the publication date on the specifications sheet, it cannot be inferred that plaintiff was provided such a sheet when he was negotiating for the second Malibu in 1986. If he knew of the statements before he made the decision to purchase a

replacement engine in 1990, he cannot claim to have relied on them. By that time, he was well aware that defendant's engines did not reach 2000 flight hours before needing overhaul; he had owned three engines that had not reached that time before

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[Note [1] con't.] basis of the bargain should be read as invoking an objective test,

under which the sellerts representations would be deemed part of the basis of the bargain unless the seller can show that a reasonable buyer would not have relied on the representations if they were brought to his attention before the sale was consummated.

ld. at 4-33. Although the ouggestion'is persuasive, it is not the way the provision is read in Wisconsin, which supplies the substantive law in this diversity action.

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needing major repairs.

I do not agree with plaintiff that the representations defendant made to him about the repairability of his engine constituted express warranties to induce him to make a sale, or that his forbearance in not demanding a new engine constituted consideration that made the repairs the equivalent of a sale. The representations did not constitute direct and positive representations of a fact, and plaintiff's forbearance cannot be held to be consideration in the absence of any showing that he had a right to demand a new engine.

Moreover, even if I could find that sufficient evidence existed to support the jury's finding that defendant had made plaintiff an additional express warranty, I could not uphold the jury's

determination of damages. Plaintiff's own attempt to justify that determination tends to undermine its reliability. Plaintiff tries first to show that work performed by Clark Aviation and Mid-America Aviation added up to $40,079.85 plus the $25,593.65 plaintiff paid for the replacement engine and repairs. Not only does the $40,079.85 not correspond with plaintiff's testimony at trial (or with his exhibit #6), plaintiff has never identified the money he spent sufficiently to show that any of it was spent on work for which defendant should be responsible, under any view of the evidence. Plaintiff conceded that the bills included the cost

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of normal maintenance, and for work done on parts not manufactured by defendant.

Plaintiff makes a second attempt to justify the award by suggesting that the jury could have taken "the $35,000 extra which Stauffacher paid for engines and engine repairs and adding a portion of the $75,000 market value loss identified by Rittenhouse." Plaintiff's supplemental brief at 51. The problem with this approach is that Rittenhouse was unable to identify what portion of his estimated loss in market value of the Piper Malibu was attributable to problems with the frame, with Piper's bankruptcy, or with defendant's engine. For the jury to take some "Portion" of this figure would have been pure speculation on its part.

Third, plaintiff suggests that the jury

might have awarded him $75,000 "Just because he has no other practical options with his half million dollar airplane investment than to buy and use the unreliable Teledyne engine product." Plaintiff's supplemental brief at 52. Again, such an award would be based on speculation. It would also demonstrate the jury's failure to follow the instructions, which directed it to award damages that represented the net gain plaintiff would have realized from the warranty but for the failure of the other party to perform--the benefit of the bargain. it is also contrary to the evidence that indicates that

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plaintiff's replacement engine is performing adequately.

In sum, I conclude that defendant's motion for a new trial must be granted. The issues to be tried will be defendants' liability for breach of express or implied warranties and the damages resulting from any such breach found by the jury.

ORDER

IT IS ORDERED that defendant's motion for judgment notwithstanding the verdict is DENIED; defendants motion for a reduction of the jury's award of $75,000 is DENIED; and defendant's notion for a new trial is GRANTED. A new trial in this case is scheduled for the week beginning June 8, 1992.

Entered this 26th day of February, 1992.

BY THE COURT:

BARBARA B. CRABB District Judge

MR. WIDULE: Yes, Your Honor.
THE COURT: Are you ready with your witness?
MR. VAN VUGT: With two of them. The third witness, we have tried to speed then, up. I think he is going to get here like 6:00 o'clock tonight. I don't have enough time to fill the afternoon, that's the problem,
THE COURT: How long do you think your two witnesses will be?
MR. VAN VUGT: My direct would be half an hour each.
THE COURT: Well, we will just send the jury home then.
MR. WIDULE: Let me make sure that I have --
THE COURT: Well, we will take ten minutes right now. As long as the Jury is out, we will take ten minutes,
MR. VAN VUGT: We do have some motions too, Your Honor. I don't know if you want to do it at this break or take a break between his resting and my witnesses or --
THE COURT: I don't want to do that. I don't want to send the Jury out again. And since I know what the deposition says, why don't we take the motions up at this time.
MR. VAN VUGT: Okay.
MR. WIDULE: For the record, Your Honor, 72 to 83 is

admitted into the record for purposes or determining this motion?

THE COURT: Right, right.

MR. VAN VUGT: Your Honor, then we would move would move at this

point to dismiss each of the claims or move for judgment on each of the claims that have been asserted and are being tried as part of this retrial of the case.

At this point I am not sure whether there is a claim that we have breached the Gold Medallion Warranty that was issued on this engine. But if there is such a claim we think that clearly has to be dismissed for lack of any supporting evidence.

I think the terms of the warranty are in evidence. The fact that every claim covered by the warranty was submitted and paid by Teledyne and that indeed they went beyond the terms of the warranty to satisfy the customer is the undisputed and only testimony regarding the Gold Medallion Warranty. So if indeed there is a claim for breach of that express warranty, we think it should be dismissed.

THE COURT: Is there such a claim?

MR. WIDULE: The only claim is whether as a result of these express warranties if the defendant made an express warranty to fix or to repair and failed to repair, that is an express warranty claim. In other words, that there was an express warranty to repair. We're saying the repairs were not made or they were not made effectively.

THE COURT: They were made.
MR. WIDULE: What's this?
THE COURT: They were made. You are saying they were not made effectively.

MR, WIDULE: Sometimes they didn't do what we had asked them to do, so they didn't -- we're saying that that's a breach of express warranty.

THE COURT: All right, let's just take the Gold Medallion Warranty. Which repairs do you claim were not done properly?

MR. WIDULE: The starter adapter at 151 hours, and there is testimony in the record that Teledyne --

THE COURT: And that's because there was or a new engine was not provided. Is that your point?

MR. WIDULE: And it's also because the starter adapter shaft continued to break or the starter adapter assembly continued to break or to have problems.

MR. VAN VUGT: Your Honor, I am afraid we are losing track of my motion, which is that we admit that we had this contract with Mr. Stauffacher. This is the Gold Medallion Warranty, Exhibit 101.

is Under that agreement we are obligated to repair or replace, repair or replace any components of the engine that are submitted to us during the period of warranty. We replaced the starter adapter assembly. Didn't fix it, we replaced the whole unit, That's what we were required

to do, and we did that.

The cylinders, we replaced them. We did the engine. We replaced the engine. We have or each of the components that was submitted to us under this warranty was replaced. That's what

we are obligated to do, and I don't think there is any testimony to the contrary, I don't think there can be any claim that we did not satisfy the requirements of Exhibit 101, the Gold Medallion Warranty.

THE COURT: MR. Widule, why do you think the Gold Medallion Wiarranty was breached?

MR. WIDULE: Because I think the terms of the Gold Medallion Warranty are not as written in the Gold Medallion Warranty, for the following reasons. These warranty terms were not made conspicuous to Mr. Stauffacher. They were referred to in a document, and the terms of the --

THE COURT: Well, that's a different argument, Let's just -- or I thought you told me that you were going to argue that the terms of the Gold Medallion Warranty were breached.

MR. WIDULE: I am going to do that.

THE COURT: But if there was a replacement of each of these items and that was what was required under the warranty, then --

MR. WIDULE: But the replacements were defective.

THE COURT: Well then, that's another point. I think that's when you get to the failure of the purpose of the warranty.

MR. WIDULE: All right, Let's talk about other express warranties then.

THE COURT: Then as far as the Gold Medallion Warranty

is concerned, I'm ruling that as a matter of law there was no breach.

MR. VAN VUGT: We then move to what I understand to be his second claim, is that there were other express warranties made by my client that under the law induced him to purchase the engine.

We have the undisputed testimony from Mr. Stauffacher that he had no dealings whatsoever, no direct contact whatsoever with Teledyne, prior to the starter adapter shaft failure that occurred at 151 hours.

THE COURT: Right. I have already ruled that the only express warranty in this case is the possibility that, Mr. Beech's statement, "if you get a replacement engine, it will be as good as new." That would be the only thing that could be considered to be an express warranty.

MR. VAN VUGT: And the new engine is clearly subject to this limited warranty, the one that says it's the sole and exclusive remedy to make a repair or replacement; that there are no other warranties, that no one else can make any other promises on our behalf.

And all Mr. Beech could possibly have been saying when he said that "this replacement engine, this remanufactured engine that you are getting is subject to

the same warranty as the new
engine and in my opinion as good as
the new engine", and if that
is a representation it's only a
representation; that it doesn't

go beyond the Gold Medallion Warranty. It cannot go possibly beyond the Gold Medallion Warranty. All he did was bring the remanufactured engine up to the status of the new one and say it's subject to all the same terms and conditions.

THE COURT: Mr. Widule.

MR. VAN VUGT: And if I may add.

THE COURT: Oh.

MR. VAN VUGT: The evidence is undisputed that there was a similar warranty issued as to that second engine, although just for a shorter period of time. So that nothing that's been attributed to Mr. Beech can possibly be a representation or a warranty that went beyond the terms of the Gold Medallion Warranty.

THE COURT: Mr. Widule.

MR. WIDULE: Your Honor, Mr. Beech made two warranties to Mr. Stauffacher. One in January of 1990, and one in October of 1990. And at both times there were heated discussions between Mr. Stauffacher and Mr. Beech. And the evidence I don't want to try to recharacterize the evidence. That's not my goal here. But there was evidence that Mr. Beech directly told Mr. Stauffacher that these repairs would make the engine safe.

THE COURT: In October of '90?

MR, WIDULE: In October of '90.

THE COURT: Why wouldn't that be covered by the new warranty that was provided with the engine?

MR. WIDULE: The warranty supplements that. In other words there were direct discussions between the engine manufacturer and the purchaser, and this is a rare occurrence. Usually -- or Mr. Rittenhouse testified to this. There are pass-through warranties. There is no contact generally between the manufacturer and the consumer. That's why we're in this thing.

At 151 hours the contact was between Mr. Scheffner and Mr. Stauffacher. They had discussions about whether this was the proper fix. They represented to him that it was. We say the evidence shows that it wasn't. The same thing in October of '90, there were discussions between the manufacturers outside of the Gold Medallion Warranty as to what --

THE COURT: The only evidence in the case at this point is that October of 1990 Mr. Beech said "If you get a reconditioned engine, it will be as good as new."

MR. WIDULE: And --

THE COURT: And provided a warranty.

MR. WIDULE: And in January of '90 as the cylinder replacement, when Mr. Stauffacher signed that release.

THE COURT: But I have already said I am not going to

be or I already ruled on that yesterday afternoon.

MR. WIDULE: All right.

THE COURT: And I am not going to revisit that. I said the only warranty that I would even consider is the statement by

Mr. Beech that "if you get a replacement engine, a remanufactured engine is as good as a new one." And that is -- or he gave him a warranty on the reconditioned or the re-manufactured engine. And why does that warranty not incorporate all of the terms and conditions of the guarantee?

MR. WIDULE: Because what's happening here is that the word "warranty" when it gets thrown around automatically incorporates all the terms and exclusions and protections in favor of the manufacturer. And I'm saying to you that it's common knowledge that a warranty is a benefit to a consumer. In this case the warranty is not a benefit to the consumer, because it's a or there's a series of restrictions here.

THE COURT: Okay. I'm prepared to rule that there was no express warranty over and beyond the written warranties that were provided to Mr. Stauffacher when he bought his plane in 1987 and/or took delivery of it in 1987 and when he received the Gold Medallion Warranty with his remanufactured engine.

MR. WIDULE: All right, Can I raise one more express warranty beyond the Gold Medallion Warranty point? And that is the 2,000 hour TBO. Mr. Rittenhouse testified that Mr.

Stauffacher was told, when he purchased the 1987 Malibu, of the 2,000 hour TBO. That's a direct representation by Mr. Rittenhouse. He is the salesperson who sold him the airplane.

THE COURT: Okay. And that motion is or whatever it is is denied, because Mr. Rittenhouse is not an agent for Teledyne.

MR. WIDULE: He's not an agent for Teledyne as a matter of law?

THE COURT: No.

MR. VAN VUGT: We would further observe Mr. Stauffacher's own testimony was that he did not rely on the 2,000 hour TBO, nor was it material to him when he made the decision.

MR. WIDULE: No. The inference from this testimony is that the TBO is a given. The TBO is important, and --

THE COURT: Well, I have already ruled.

MR. WIDULE: All right.

THE COURT: Now, the next question is whether the warranties that were provided failed of their essential purpose, and I think that's the essence of your claim.

MR, VAN VUGT: And we think that that claim fails as a matter of law as well, Your Honor. To put things in focus here, Wisconsin law, which is no different than other states, is that a manufacturer of a product that puts out a limited warranty like we have for this engine can disavow any implied warranties of merchantability or fitness and that those limitations will be upheld; that if a manufacturer says "we make no implied warranties, here's our express warranty, and we give you nothing

else" that will be upheld unless the warranty itself just doesn't do its job.

THE COURT: Right.

MR. VAN VUGT: And we have the Holiday Rambler case, which I think is still the leading case in Wisconsin, that discusses what it means to have a warranty fail of its essential purpose. Because unless it fails of its essential purpose, then that is the only warranty. We have already determined that has not been breached, and there can't be any breach of implied warranties; all right?

But what the Holiday Rambler case says is that there has to be repeated unsuccessful attempts to fix the same problem which makes the product inoperable. It has to be a situation where the owner is deprived of the benefit of the use of the product because it doesn't work, and it doesn't work even though the owner has submitted it for repairs. Under the warranty, the manufacturer has attempted to repair it but has not been successful doing so.

We are dealing here with an airplane that has provided Mr. Stauffacher to date with close to fourteen hundred hours of flying time. That fact alone I think dispels any notion that his airplane doesn't work.

From the evidence in the record there has been not even one maintenance problem since May of 1991t,more than a year ago. Except for the initial failure that

occurred back in August of
1987, when his starter adapter shaft
broke, each and every one
of these problems manifested
themselves during routine
maintenance inspections when the
airplane was in for service

anyway.

And finally we have the testimony that there has been no recurrence of the same problem. They involve different components, none of which has failed or required maintenance on more than one occasion.

We had first the starter adapter shaft. It broke. It was replaced. It's never been touched again.

"We then had the cylinders. They were replaced and were never touched again.

We then had the cracked case that required the entire engine to be replaced, but that was unrelated to the previous problems that had occurred. And then finally -- and that was in December of 1990, almost a year and a half ago.

And then the only subsequent maintenance event of any kind is this cracked housing again, which was a separate unit from any of the other ones previously involved.

This is so far removed from the Holiday Rambler cases, and we think the evidence is such that it cannot be claimed that the warranty fails of its essential purpose; that as a matter of law, no reasonable jury properly following the instruction could conclude that this warranty has not worked.

THE COURT: I want to reread the Holiday Rambler case over the recess. May I have the citation?

MR. WIDULE: Yes, Your Honor. It is 83 Wisconsin 2d. 406. And just for the record, if I could just make a couple of

comments about that case. Do you mind?

THE COURT: Fine.

MR. WIDULE: There were several different or many, many different aspects of the failure of this product. Battery, electrical system, clock, vents, tanks.

THE COURT: Clocks never work.

MR. WIDULE: Yeah, but these are little things. This is not a dangerous situation. The guy's clock doesn't work. Air suspension system, steering problems, front brakes, furnace fan. These are totally unrelated things. But rear brakes, air-conditioning. That's Point Number 1.

Here's a quote from Page 420. "Every buyer has the right to assume his new car," - that's a car - "with the exception of minor adjustments, will be mechanically new and factory is furnished, operate perfectly, and be free of substantial defects."

THE COURT: I am going to review it over the recess, and then we will meet without the Jury.

MR. WIDULE: There are other cases besides Holiday Rambler. There is a case called -- the defendant was Basic 4. I can't remember the plaintiff's name. But it's a follow-up case

to this, and it deals with the conspicuousness of the limiting language.

Also on 415 in Holiday Rambler, "The limiting language must be the language limiting. Implied warranties must be

conspicuous and must not be unconscionable in light of the circumstances in which the contract was made."

THE COURT: But neither of those elements is present in this case.

MR. WIDULE: Conspicuousness?

THE COURT: Right.

MR. WIDULE: In the Basic 4 case it says it has to be brought home to the buyer's limitations. It was not. Take a look at the exhibits. This Gold Medallion Warranty was not attached to the contract Mr. Stauffacher signed in Exhibit Number 121. All it refers to is some pass-through warranties.

And the only document Mr. Stauffacher did sign that when he got this warranty handed to him in a package of things, as Mr. Rittenhouse testified, was a document that said the Gold Medallion Warranty has a thousand hours and et cetera. It just refers to the Gold Medallion Warranty; doesn't have all these limitations.

The limitations were delivered with the engine in a package, and Mr. Stauffacher signed the contract. Those limitations weren't brought home to him, and that is undisputed.

MR. VAN VUGT: It certainly is not undisputed. Mr. Stauffacher's complaint alleges that he got a copy of it in

April of 1987. His prior trial testimony, which he acknowledged most recently was that he had known about the Gold Medallion Warranty from Day 1. He has submitted claims under this

warranty for a period of five years now.

THE COURT: I think what's undisputed is that he did not see the warranty when he entered into the sales contract.

MR. WIDULE: The complaint is not in evidence in this case.

MR. VAN VUGT: He had had a previous airplane with the same warranty on the same engine in it prior to that time, and the or I don't think there is any -- or, well, with respect to the "fails of its essential purpose argument", we would also refer the Court to the Wisconsin Lemon Law, which although it doesn't apply here by any means, it certainly was a reaction to the cases like the Holiday Rambler case in which by statute they sort of define what "failure of its essential purpose" means. And there they talk about statutorily four attempts to fix the same problem and, as a result of which you know, 30 days of down time is the threshold before you can even make a claim under the Lemon Law.

THE COURT: And the statute is?

MR. VAN VUGT: My associate took my legal research files. I can't cite it to you, but I would be happy to look at it over the break and get back to you.

MR. WIDULE: Yes, I would like to see it.

MR. VAN VUGT: Not that it -- or it applies clearly to motor vehicles, not to this.

THE COURT: We will recess until 11:00, if you would

tell the Jury.
MR. WIDULE: Thank you, Your Honor.
THE CLERK: This court stands recessed until 11:00 o'clock.
(Recess: 10:45 a.m. - 11:10 a.m. Jury now present.)
THE CLERK: Please be seated.
THE COURT: I am sorry, we were going to meet without the Jury. I have to send you back out. There are still some matters we have to take up.
THE CLERK: I'm sorry.
(Jury left courtroom at 11:10 a.m.)
THE COURT: All right. Counsel, I have been reviewing the Holiday case and also the Lemon Law that Mr. Van Vugt referred to.
MR. WIDULE: Can you give me the cite on the Lemon Law?
THE COURT: 218.015.
MR. WIDULE: Your Honor, before your decision, may I make one more argument?
THE COURT: Hm-hmm.
MR. WIDULE: All right.
THE COURT: And I'm not ready to decide. There were some other points that I wanted to discuss with counsel.
MR. WIDULE: I just want to make one argument, and I will try to keep it as cohesive as possible.
THE COURT: Okay.

MR. WIDULE: And that is the case, which is Wisconsin Electric Power Company versus Zallea Brothers, Inc., 606 F. 2d 697, 1979; and it's cited in Wisconsin Statutes under 402.315, which deals with implied warranties, and gets into this whole issue about whether implied warranties --

THE COURT: 606 Fed. Supp?

MR. WIDULE: 697.

THE COURT: Okay.

MR. WIDULE: And what it deals with is the awareness of the defect and whether the warranty -- or whether relief should be granted under 402.315 or not. And here's why that is very important.

Plaintiff's Exhibit Number 62 dealt with the through bolt torque check and the Number 2 main bearing inspections. That was brought up by my witness. That came out in June of '89. Subsequent to that, Mr. Stauffacher had his main bearing spinning problem.

Now, I will grant you that Teledyne made some or tried to make some repairs to this engine on this issue and then from that point excluded serial numbers, including Mr. Stauffacher's. I will grant you that.

But they clearly had notice of this defect. And to make the assumption that the design repairs they made were going to solve

the problem is not or does not exculpate them from liability. They had knowledge of this particular defect. To try to cure it

doesn't help.
This also applies to the broken starter adapter shaft. If you look at Plaintiff's Exhibit Number 63, in June of '87 it said "broken starter adapter shafts." In August of '87 Mr. Stauffacher's starter adapter shaft broke. I will agree with you that the serial numbers are not the same, but they had knowledge of the defect. And they made the corrections, and the corrections were not good.
My point is this: Knowledge applies to determine whether this applies. It also goes to the unconscionability or the good faith, the whole good faith issue in this whole case. And I will grant you there isn't a lot of evidence in the record about that.
Also it goes to the unconscionability. And what I'm asking you to do is to rule that these exclusions are unconscionable in this case, because it was not brought home to Mr. Stauffacher and also because of the severity of the defect and the knowledge that they had of the problems.
And to excuse yourself from responsibility by saying "we tried to fix it, we tried to fix the problem in the fleet" and then have it fail does not relieve them from liability under law.

THE COURT: Mr. Widule, if you look at the Holiday Rambler case and also the Lemon Law the warranty provides or the remedy is replacement. If you have got a car and it doesn't

work and you take it in to be fixed and they give it a few tries, four under the Lemon Law of this same problem, and they can't fix it and it's out of use for 30 days, you are entitled to a replacement or, under Holiday Rambler, to revoke acceptance.

MR. WIDULE: And the distinction, the clear --

THE COURT: Mr. Stauffacher received a replacement engine. He received as much as a buyer of a car would receive under the Lemon Law, so how's he --

MR. WIDULE: The clear distinction, Your Honor, is a lemon or if you have a box of apples and there is one lemon in the box, the Lemon Law applies and you give the man a new apple. If you have an entire fleet that are subject to these service bulletins which I am trying to again move into evidence, 62 and 63 -- I'm sorry. 61 and 62. If you have -- and those service bulletins point out that they had knowledge of this through the engine life.

THE COURT: Let's assume you have a whole fleet of lemons.

MR. WIDULE: Right.

THE COURT: What is the remedy that you think you are entitled to under the UCC?

MR. WIDULE: I am saying that at that point under the

UCC and under the Wisconsin Statutes and under the Murray case, that appropriate remedies under -- or you mean other than

replacement?
THE COURT: Right.
MR. WIDULE: Damages for breach of contract, for breach of implied warranty of -- for breach of implied warranty. All damages flowing from that breach.
THE COURT: So you are talking about consequential damages from the breach?
MR. WIDULE: Consequential and actual. Mr. Stauffacher's actual damages, and the consequential, and the -- right.
THE COURT: Well, let's talk about those specifically. That would be loss of use, and he has not testified that since the replacement was in that he has had any loss of use; right?
MR. WIDULE: No. He testified that he did have considerable loss of use because -- yes, he did. Well, with respect, Your Honor, if --
THE COURT: Because he wasn't --
MR. WIDULE: The weather is very dangerous. He can't fly at 25,000 feet, so he can't get above the weather problems. He talked about lightening strikes. He talked about risk at 12,000 feet. He has got to fly at 12,000 feet in order to keep this thing from overheating. That was clear in the evidence. And so he has lost the use of his airplane. He testified that

it takes him or he loses 30 knots of air speed. That is very important. If you fly at 25,000 feet, you fly a lot faster than

you do at 12,000 feet. That's a fact. And he can testify to that. So, yes, he's got loss of use. It's in the record. He's got actual damages.

THE COURT: But there's no expert testimony as to what that loss of use translates into in money.

MR. VAN VUGT: And to interject as well. Mr. Stauffacher has said that he has chosen not to fly at those altitudes and --

MR. WIDULE: Mr. Stauffacher said he had no choice.

THE COURT: Mr. Widule, let's start. For today, no interruptions.

MR. VAN VUGT: Neither he nor anyone else has suggested that the limitations on his airplane have been reduced, that he can no longer or it's no longer certified for 25,000 feet or that the operating instructions have been changed at all. He for his own reasons has chosen not to do things he did before. But the use is still 300 hours according to the witness.

MR. WIDULE: Loss of use of the airplane, Your Honor, that's -- there's plenty of evidence in the record to substantiate that.

THE COURT: Well, there isn't.

MR. WIDULE: Should we talk about the other damages?

He's had loss of value of $40,000. That was testified to by the expert.

MR. VAN VUGT: We disagree.

MR. WIDULE: He spent $34,711. That was testified to by Mr. Stauffacher. He also purchased 23,000 of --

THE COURT: He has not adequately explained that $34,000.

MR. WIDULE: Those are repairs made to the engine, and the source documents are exhibits here. Mr. Van Vugt had a chance to cross-examine him at the last trial and this trial on that testimony and he chose not to. Also the special equipment that he bought for the collision avoidance project, he testified that you can't just take that out of the airplane and put it into another airplane without a lot of expense. So he has been damaged by that $23,650.

THE COURT: There is no evidence that that collision avoidance installation is any damage to him. Theoretically if that adds to the value of the plane, it should add to what he can get when he sells it.

MR. WIDULE: But it's specially-designed equipment. Nobody else can use it. He is the only one in the world that has the system. He is the only one in the world that has that collision avoidance capability. No one else can use it.

THE COURT: No one else can use it?

MR. WIDULE: That's

correct, Your Honor. You need the permission from the FAA to use the data stream for this thing.

THE COURT: Well, that certainly is not in this case.

MR. WIDULE: Well, the fact that no one else has it is

in this case. I proved a 40,000 loss of use, 23,682 in special equipment which is specially designed and can't be taken to another airplane, and 34 --

THE COURT: No. But it can be sold with the plane and increase the value of the plane.

MR. WIDULE: And $34,711 in expenses, of which Mr. Van Vugt only disputed a couple hundred bucks. So that's 75. That's $100,000 in damages.

THE COURT: Mr. Widule, I don't know that.

MR. WIDULE: And a jury would agree with me.

THE COURT: I'm beginning to feel I'm in another universe and --

MR. WIDULE: All right. A jury would agree with me, Your Honor; and I know that you don't.

THE COURT: Okay. Would you keep your mouth shut for 30 seconds, Mr. Widule. Just indulge me. What I have been trying to say is that Mr. Stauffacher got up here and said, "I spent $34,000." He did not itemize that, he did not explain what that was for. He did not show that that was any money at all that Teledyne was responsible for except for the $23,000 he spent for the engine. That was the only itemization that he supplied.

It is the plaintiff's obligation

to prove the case. It is
24 not Mr. Van Vugts obligation to
cross-examine when somebody
25 offers as conclusory and vague and
unsupported evidence as that.

It is simply insufficient to go to the jury to show that he actually incurred costs that are reasonably attributable to Teledyne. He didn't explain whether those were normally recurring, normally recurring maintenance costs. We have absolutely no idea what those expenses were for. None whatsoever. I said in the Order that I entered in March that those were inadequate at that time. You had plenty of warning of the inadequacy of that claim.

Now, what I wanted to talk about is that I simply don't understand. I really don't understand how the Jury can be expected to decide that if Teledyne replaces an engine, that that isn't an adequate remedy for the problems that you have identified in the engine. And assuming that all those are horrible and awful and shouldn't have happened, which I'm prepared to assume, they replaced the engine; and Mr. Stauffacher has not had any serious problem with the engine since.

MR. WIDULE: Well, that's your interpretation of the evidence, Your Honor. But excuse me for interrupting you.

THE COURT: Go ahead.

MR. WIDULE: Mr. Stauffacher had the problem with the starter adapter cracked housing, and

you can split hairs with me and say that that's a totally different problem. Read the Holiday Rambler case.

Mr. Rittenhouse, or it can be inferred from his testimony

that these engines are not safe, if he didn't say it, and it wasn't objected to. Maybe it should be stricken from the record in your opinion. I don't know. The remanufactured engine is unsafe. It's not going to 2,000 hours TBO. Mr. Stauffacher's lost use as a result of these problems. He can't fly the remanufactured engine. It still overheats. So that's our case,, Your Honor.

I can't change the facts of this case. I can't change the fact that I'm dealing with the legal validity of the Gold Medallion Warranty and its limitations.

And what I'm asking you to do is as a matter of law to eliminate those, not only the disclaimers as to what the warranties are, but eliminate the remedies. And I mean eliminate the limitations on remedies. And as to damages I have already spoken.

THE COURT: I don't think I can infer from Mr. Rittenhouses testimony that this is an unsafe engine. He testified that he's continuing to work on these engines, he's continuing to send people up in the air with them.

MR. WIDULE: Your Honor, Mr. Stauffacher testified that or I mean just from his own personal experience he's not been

put up in the air with a safe engine.
I will grant you that these or that you can argue that these are different problems and happening to the same engines and they are heat-related, and there's a lot of evidence about heat

in these things. Mr. Rittenhouse frankly wasn't allowed to talk about the safety of this engine. He wasn't allowed to.

The reliability of the engine. I mean it was made clear to me from the beginning that that was going to be tough to get that issue in, and it was. The question is the legal, the legal validity of the Gold Medallion Warranty under the circumstances of this case. We agree on what the issue is.

THE COURT: Mr. Van Vugt.

MR. VAN VUGT: Not to concede on the other argument at all, but I think even if we were to throw out the Gold Medallion Warranty and put the question to Mr. Widule, "What implied warranty of merchantability was there that has been breached". a merchantability warranty is a warranty that the airplane is generally suitable for the purposes for which this gentleman bought it. He has flown it for thirteen hundred fifty hours. He has flown it problem-free for the last year. I don't believe the evidence would support a claim that we have violated an implied warranty of breach of merchantability.

Fitness for a particular purpose, of course, requires a specific/almost negotiated or clearly understood commitment that this product will serve this

particular special purpose, and you
22 can't generally have that kind of a special purpose warranty
23 without some communication between the manufacturer and the
24 buyer, which again we don't have here. So I don't think fitness
25 for a particular purpose even belongs here. And the warranty of

merchantability, if there were one, hasn't been breached.

Even if you take the next step and say it has been breached, what remedy would we give him at this point? He's got an operating engine, one that has no caused any problems for a year. It's one, which according to Mr. Rittenhouse, if we removed it from the airplane, it would diminish the value of the airplane by the cost of another engine. The only fix would be to put another one in. He doesn't want to revoke acceptance of it. He doesn't want any of the other remedies that typically prompt a claim for a breach of warranty.

MR. WIDULE: Revoking acceptance of the entire airplane he might want. But let me talk about fitness for a particular purpose for a moment. This airplane, the evidence is in the records but I admit it came from Mr. Stauffacher, is a single-engine airplane designed to go further than all of his other airplanes. It's the cream of the crop single-engine airplane. It has 25,000 foot capability. It has pressurization. It has all kinds of other things. This is a specially-designed airplane. It's got a particular purpose in mind: To give the most capabilities possible to a single-engine

user, and it hasn't met that. It hasn't met that. And Mr. Stauffacher's been damaged accordingly.

He's got to fly at 12 instead of 25. And you can argue to the Jury that he doesn't or that that's his own volition. But that's a factual question.

And as to the warranty of merchantability, we got into this a little bit in the jury instructions. The last time our proposed jury instructions were that we wanted definitely a fitness for a particular purpose as well as merchantability, and we were only given merchantability, and that was fine at that time. But now we would request both.

As far as revoking acceptance, the man paid $470,000 for the airplane. And from the start we have been saying: Give him the difference between 470,000 and what it's worth today, which is 245,000. And that evidence is in the record. If you are willing to give me revoking acceptance as a remedy, maybe that is appropriate.

THE COURT: Only as to the engine.

MR. WIDULE: Well, the engine is really put into the airplane. The Holiday Rambler, those are all different parts. They were made by different people.

MR. VAN VUGT: But he was suing the manufacturer there. That's why I'm afraid by sending this to the Jury simply because we can't find something that makes it clearly inappropriate to do so just forces them to make the decisions that I don't think can be made. There are no damages that can be defined here. There are no warranties that can be

defined here, and --

MR. WIDULE: Then what risk do we have letting the Jury decide whether Mr. Stauffacher was damaged?

THE COURT: All right. Mr. Van Vugt would you finish

your sentence.

MR. VAN VUGT: You don't submit questions to the Jury for which there is no evidence, and you don't ask them to assess damages when there is no evidence of any damage. And you can't even articulate in a fashion that I can understand just what your client wants.

MR. WIDULE: I have. I have in this argument.

MR. VAN VUGT: We stand on the arguments previously made. I mean the Gold Medallion Warranty contains limitations which would exclude any remaining theories of liability. The only way he can get over those is to establish that it is unconscionable as applied to Mr. Stauffacher, and it's clearly not. We have bent over backwards and done everything required under that agreement.

He has gotten thirteen hundred fifty flying hours out of those engines; and right now he has an airplane, which according to his own witness, is worth $20,000 more than if he had never had any problem at all.

And in addition to that, he has got a warranty that carries him through 1995; whereas otherwise he would have no warranty protection at all. So he has a low-time engine. It's worth $20,000 more, and another three years of warranty protection,

none of which he would have had if there had been not one single problem. How can anyone say that this warranty was operated unconscionably to Mr. Stauffacher or that it has failed of its

essential purposes for the same reasons?

I mean he has been taken care of very well by this warranty. And if he has no confidence in the product, -- and really that's what it boils down to. He doesn't like it. He is angry about it, and he is not comfortable flying this airplane. we think those sentiments are unfounded, but we can't talk him out of it. He just doesn't like to fly the airplane and doesn't like the engine, but there is nothing we can do about that or that the Jury can do about that.

THE COURT: I think I'm prepared to find as a matter of law that no reasonable jury could reasonably find that the limitations expressed in the Gold Medallion Warranty failed of their essential purpose. Teledyne said it would repair and replace any defects. It made efforts to repair. When the efforts to repair were not acceptable it replaced the engine and it replaced it at the same basis that the Wisconsin Legislature approves for cars, which is a pro-rata portion of the use that the owner has already gotten out of the product.

The product is not or Mr. Stauffacher has not shown that the product he received as a replacement is unsafe or unreliable or that it's so completely unfit for its

purpose as to show that
the replacement was an inadequate remedy for the defects in the
engine, and I just think we're wasting time to have any more
evidence on this. Unless you are going to say that
manufacturers can't have a warranty and can't provide any

limitations under that warranty unless they produce an absolutely perfect product, I think that this is a reasonable warranty and that the steps that Mr. Stauffacher has testified were taken by the defendant met all of its obligations under the warranty and then some.

I think that the evidence is that the defendant made extraordinary efforts to try to meet the complaints that Mr. Stauffacher had.

I can certainly sympathize with him. He bought a product that he thought would work in a certain way, and it hasn't worked as well as he thought it would work; and I can certainly understand that he's upset about that and that he's very disappointed in it, and he's put a lot of money into it.

But the warranty says what it says. It's not unconscionable. He had an opportunity to read it. The terms of the warranty are very clear. They are clearly expressed in the written documents that he received when he picked up the plane. He had prior experience with that warranty, and he had prior experience with the engine, had prior experience with the plane.

He bought something that he's unhappy with now, but I don't think that this is or his unhappiness is anything that the

defendant has any liability for at this point after the remedies that they have provided under their warranty.

So I am going to direct a verdict for the defendant in this instance and enter judgment for the defendant on all of the

claims. So I will bring the jury back in and just tell them that their role in the case is over.

(Jurors entered courtroom at 11:35 a.m.)

THE COURT: Members of the Jury, after very lengthy discussion with counsel, I have entered judgment in this case on behalf of the defendant, so I will be excusing you. Your service as jurors in this case is finished. You are discharged. You are free to go about your business and resume your own lives.

I want to tell you that even though it wasn't necessary for you to go into deliberations in this case, your involvement in the case was extremely important. If you hadn't been here, we couldn't have had the plaintiff's case and we couldn't have reached a decision on the issues in the trial.

I'm sorry that it's happened this way. I think it's always kind of frustrating for a jury to be assembled and to listen, as attentively as you have to the evidence, and then not have an opportunity to hear the whole case and reach a decision. This doesn't happen very often, but it does happen sometimes, and it happened in this case.

on behalf of the lawyers in the case and the Court, I want to thank you very much for your

attentiveness and your cooperation and your being here for this.

Do any of you have any questions before you leave, if there's anything you want to ask about.

JUROR TAUBER: What was the outcome?
JUROR EHSTER: Yeah.
JUROR TAUBER: Can you share that with us?
THE COURT: I held as a matter of law that the warranty that was provided by the defendant the two warranties actually on the two engines were not breached, and that they did not fail of their essential purpose.
And failing of their essential purpose is a legal term which means essentially that if a warranty provides remedies but the remedies are inadequate, they don't work, they don't meet the problem, then you can go behind the warranty and impose other duties on the manufacturer.
But I held as a matter of law that the remedies provided in this case were adequate the efforts to repair and then the eventual replacement of the engine at a prorated cost to the plaintiff.
Anything else?
JUROR TAUBER: Thank you,
THE COURT: Okay. You can just leave your notepads. Thank you very much. Perhaps we will be seeing you soon in another case.
THE CLERK: All rights jurors are excused.
(Jurors left the courtroom at 11:38 a.m.)
THE COURT: All right,

counsel. Anything further that you want to take up this morning?

MR. WIDULE: Nothing at this points Your Honor. Just to make the comment that the distinction that we were trying to draw was that -- you see, I have flown in that airplane myself. And I can tell you that it's a very scary thought to think that when you are 20,000 feet in the air, that you have an unreliable engine. And Mr. Stauffacher fortunately was not hurt or killed.

However, in order to have a cause of action under the circumstances of the ruling that we have seen today, you have to be hurt and killed; and that that concerns me, and that is why sometimes I got into the debates with you that I did was that I believe very strongly in what I was after here.

And I think the real issue was not fraud, although I don't want to categorically state that, but the real issue was whether the warranty failed of its essential purpose. And I can understand your ruling, and I can understand your ruling and respect it.

THE COURT: Okay. Well, I'm very happy that Mr. Stauffacher wasn't injured or killed, and I am sure that Teledyne was very happy that nothing happened. Because as you say, it's a different lawsuit if

there's an injury.

MR. WIDULE: That's correct.

THE COURT: But that wasn't this lawsuit fortunately. I think he just as soon forego the huge damages he might have been awarded had something happened.

MR. VAN VUGT: The original exhibits should be left in

the record?
THE COURT: That's right. Anything that was moved into evidence. If you want to look over the exhibit listst they are right here. I will leave them with the Clerk so that you can check them over.
MR. WIDULE: Thank you, Your Honor.
MR. VAN VUGT: Thank you, Your Honor.
THE COURT: Thank you both.
THE CLERK: This Court stands adjourned.
(Proceedings adjourned at 11:40 a.m., and resumed in open court at 12:20 p.m., outside the presence of the jury, as follows:)
THE CLERK: Case Number 90-C-903, Stauffacher versus Teledyne.
THE COURT: Counsel.
MR. WIDULE: John Widule for the defendant.
MR. VAN VUGT: Eric Van Vugt for defendant.
THE COURT: What seems to be the problem?
MR. WIDULE: Just some quick housekeeping issues.
MR. VAN VUGT: There is one exhibit. It's the service warranty file for the first engine that was marked and offered as Defendant's Exhibit 51. Excuse me. Defendant's Exhibit 105 and Plaintiff's Exhibit 51. It's the same document. We stipulate that it was offered and

received.

THE COURT: Okay.

MR. WIDULE: Both 51 and 105 were received.

THE COURT: Okay, that's fine.
MR. VAN VUGT: And for 61, he's made an offer to admit 61, which is a Service Bulletin, and we don't object to that.
THE COURT: 61?
MR. VAN VUGT: Yes.
THE COURT: So I will change my earlier -- oh, all right. That wasn't ruled on.
MR. WIDULE: And Number 62 also, Your Honor. We offer for the same rationale to admit 62.
MR. VAN VUGT: We have not stipulated to that.
THE COURT: And that I had not received. I had ruled on that, 62.
MR. WIDULE: You ruled on 62?
THE COURT: Yes.
MR. WIDULE: And I asked you to reconsider your ruling, and you are saying no?
THE COURT: Right.
MR. WIDULE: All right. Then I am going to file my original depositions within a few days. is that all right?
THE COURT: Fine, hm-hmm.
MR. WIDULE: Nothing further.
THE COURT: Do you have new ones?
MR. WIDULE: No. Just the original depositions that we were marking up and things.
THE COURT: I think we have those.

MR. WIDULE: Not all.
THE COURT: Foster we have. I have Beaty, Rittenhouse.
MR. WIDULE: You don't have the original Beaty deposition. Those are the copies that we marked up.
THE COURT: Are they?
MR. WIDULE: Yes. I don't recall filing them.
THE COURT: The reporter does have --
THE CLERK: 67.
THE COURT: That is a marked-up copy.
MR. WIDULE: I would like the marked-up copies also in the record if you don't mind, because somebody can sort through all of that.
THE COURT: Some lucky law clerk in the Court of Appeals.
MR. WIDULE: I have nothing further.
THE COURT: Okay, thank you.
MR. WIDULE: Thank you.
MR. VAN VUGT: Thank you.
MR. WIDULE: And then I will file the original.
THE COURT: Okay, thank you.
MR. WIDULE: Thank you.
(Whereupon, proceedings adjourned at 12:25 p.m.)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

December 7 , 1993.

Before

Honorable JOEL M. FLAUM,
Circuit Judge
Honorable DANIEL A. MANION,
Circuit Judge
Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 92-2686

DAVID G. STAUFFACHER] Appeal from the
Plaintiff-Appellant,] United States
] District Court
V.] for the Western
] District of
TELEDYNE CONTINENTAL] Wisconsin
MOTORS]
Defendant-Appellee.] No. 90 C 903
]
] Barbara B. Crabb,
] Chief Judge

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiff/appellant on November 22, 1993, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is, hereby DENIED.